2203

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 856. 191.

JETTY SIMON, PLAINTIFF IN ERROR,

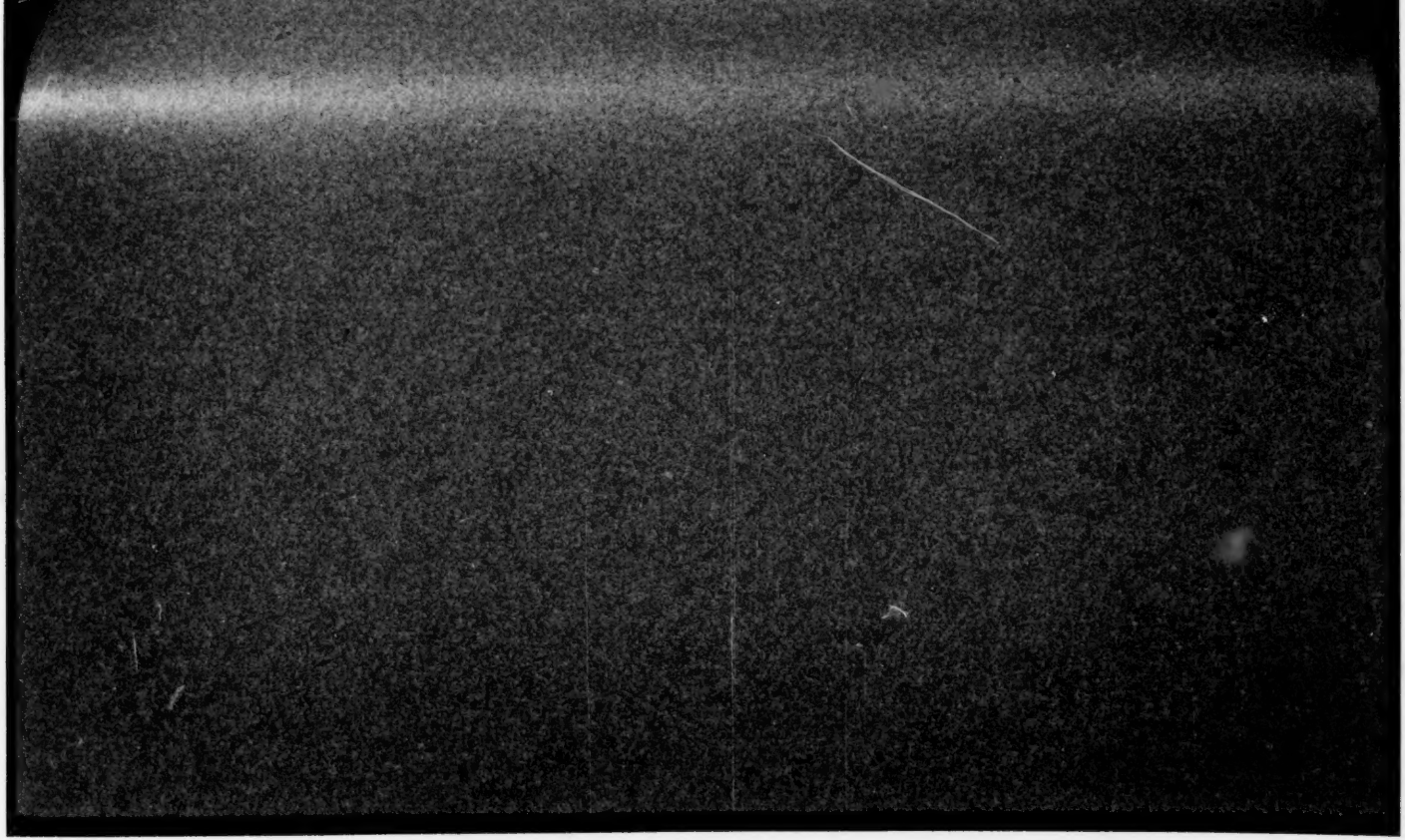
vs.

JOHN N. CRAFT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED JANUARY 29, 1890.

(17,621.)



22035

(17,621.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 507.

JETTY SIMON, PLAINTIFF IN ERROR,

vs.

JOHN N. CRAFT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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1 JETTY SIMON, Plaintiff in Error,
vs.
JOHN N. CRAFT, Defendant in Error.

I, Robert F. Ligon, Junior, clerk of the supreme court of Alabama, by virtue of the foregoing writ of error and in obedience thereto, do hereby transmit to the Supreme Court of the United States an authenticated copy of the record of the proceedings had in the supreme court of Alabama in the case of Jetty Simon, appellant, *vs.* John N. Craft, appellee, attaching thereto copies of the opinions filed by the supreme court of Alabama in said cause, and together with the assignments of errors and prayer for the reversal of the decision of the supreme court of Alabama, together with the citation to John N. Craft, defendant in error, with the return of the marshal thereon; also the original writ issued by the supreme court of Alabama, the prayer of Jetty Simon, plaintiff in error, therefor, the order of the chief justice of the supreme court of Alabama allowing the same, his certificate, and the bond filed by the plaintiff in error, approved by the chief justice of the supreme court of Alabama.

In testimony whereof I have caused the seal of this the supreme court of Alabama to be hereunto affixed, in the city of Montgomery, State of Alabama, on the 15 day of January, in the year of our Lord nineteen hundred.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of Alabama.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the said State of Alabama, before you or some of you, being the highest court of law or equity of the said State in which a decision can be had in the said suit between Jetty Simon, plaintiff in error, and John N. Craft, defendant in error, wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said Jetty Simon, plaintiff in error, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you will have the same at Washington on the 14th day of February, 1900, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Southern Dist. of Ala.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the southern district of Alabama, at the city of Mobile, Alabama, this the 2nd day of January, A. D. 1900.

RICH'D JONES,
Clerk U. S. Circuit Court for the Southern District of Alabama.

Allowed by—
THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John N. Craft and Messrs. Pillans, Torrey and Hanaw, and Bastor and Gray, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, at Montgomery, wherein Jetty Simon is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand, at the city of Montgomery, in the State of Alabama, this the 15th day of January, in the year of our Lord one thousand and nine hundred.

THOS. N. McCLELLAN,
Chief Justice.

4 [Endorsed:] 216. Original. 56. Received in office January 18th, 1900. Frank Simmons, U. S. marshal. Executed by serving copies of this writ on Jno. N. Craft, Bestor & Gray, and Pillans, Torrey & Hannaw. Frank Simmons, U. S. marshal, so. dis. Ala. Marshal's fee, $6.00.

5 1 Div., 19.

Filed Mar. 31, 1899. Robert F. Ligon, Jr., Clerk.

Supreme Court of Alabama.

JETTY SIMON, Appellant (Plaintiff),
vs.
JOHN N. CRAFT, Appellee (Defendant).

From Mobile circuit court.

Apr. 5, 1899.—Submitted on briefs.
Nov. 23, 1899.—Affirmed on the authority of Craft *vs.* Simon, 118 Ala., page 625.

DOWDELL, *J.*

6 A transcript of the record and proceedings had in a certain cause pending in the circuit court of Mobile county, Alabama, therein lately pending, wherein Jetty Simon was plaintiff and John N. Craft, substituted defendant in place of Charles H. Brown, original defendant, was defendant.

Summons and Complaint.

THE STATE OF ALABAMA,
Mobile County.

Circuit Court of Mobile.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Chas. H. Brown to appear before the circuit court of Mobile county, Ala., at the place of holding the same, at the next term thereof, then and there to answer the complaint of Jetty Simon.

Witness B. F. Jackson, clerk of the said court, at office, this 6th day of September, in the year of our Lord one thousand eight hundred and ninety-five.

Attest: B. F. JACKSON, *Clerk.*

I acknowledge myself security for the costs in this suit — 2nd day of Dec., 1895.

W. MITCHELL. [SEAL.]

JETTY SIMON, Plaintiff,
vs.
CHAS. H. BROWN, Defendant.

The plaintiff sues to recover possession of the following tract of land: Beginning at a point on the north line of Church street and west from the northwest intersection of Church and Joachim streets and distant therefrom fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts, running thence westerly along the northern line of

Church street fifty-six feet and nine inches (56 9/12 feet) or thereabouts; thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts; thence easterly and parallel with Church street fifty-six feet and nine inches (56 9/12 feet) or thereabouts; thence to the point of beginning, bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. L. Jones, of which he was in possession, and upon which, pending such possession and before the commencement of this suit, the defendant entered and unlawfully withholds, together with ($5,000.00) five thousand dollars for the detention thereof.

7

GREGORY L. & H. T. SMITH,
Attorneys for Plaintiff.

Sheriff's Return.

Rec'd September 6th, 1895, and on the same day I served a copy of the within complaint and summons on Chas. H. Brown.

P. B. DORLAN, *Sh'ff*,
By ED. HARRIS, *D. S.*

Order Allowing John Craft to Defend in Place of Chas. H. Brown.

At a regular term of the circuit court of Mobile county, State of Alabama, begun and held in the city of Mobile on the 25th day of November, 1895, the same being the fourth Monday after the fourth Monday in October, 1895, the Honorable William S. Anderson, judge of the thirteenth judicial circuit of Alabama, present and presiding, and on the 6th day of December, A. D. 1895, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

JETTY SIMON *vs.* CHARLES H. BROWN.	Jno. N. Craft, the Landlord, Comes into Court and is Allowed to Defend in Place of Charles H. Brown.

This day came the parties, by their attorneys, and also came John Craft, by his attorney, and shows to the court that he is the landlord of the premises sued on in this cause, and, upon his motion, it is ordered and considered by the court that the said Jno. Craft be, and he is hereby, allowed to defend this suit in the place and stead of Charles H. Brown.

Judgment.

And on the 15th day of January, A. D. 1896, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

JETTY SIMON *vs.* JOHN N. CRAFT, Intervening as Landlord and Substituted for Chas. H. Brown, Sued as Tenant, said Craft Being the Sole Defendant as Landlord on His Own Motion.	Jury and Verdict for Plaintiff. Damages Assessed at $412.00, and for Land Described in Complaint.

This cause being called for trial, came the parties, by their attorneys; and a jury being selected, empannelled, and sworn, and having heard the evidence and argument of counsel, together with
8 the instructions of the court, and having retired and considered of their verdict, returned, and by their verdict said, "We, the jury, find for the plaintiff for the lands described in the complaint and assess her damages at four hundred and twelve dollars," it is therefore ordered, considered, and adjudged by the court that the plaintiff have and recover of the defendant, John N. Craft, the following-described real estate, viz: Beginning at a point on the north side of Church street and west from the northwest intersection of Church and Joachim streets and distant therefrom fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts, running thence westerly along the northern line of Church street fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts; thence northerly and parallel with Joachim street eighty feet and six inches — thereabouts; thence easterly and parallel with Church street fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts; thence to the point of beginning, bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. L. Jones, together with four hundred and twelve dollars ($412.00) damages for the detention thereof, and that a writ of possession of said real estate issue on behalf of the plaintiff against the defendant in said cause, together with an execution for the sum of four hundred and twelve dollars and the costs of said cause.

The defendant thereupon prayed an appeal to the supreme court of the State of Alabama, and he having prayed the court to fix the amount of the supersedeas bond to be given upon said appeal—

It is further considered, ordered, and adjudged that a supersedeas bond in addition to the bond prescribed by the statute, in order to supersede the monetary portion of the judgment, be given, in the form prescribed by law, in the sum of five hundred dollars.

Bond.

STATE OF ALABAMA, }
County of Mobile. }

Know all men by these presents that we, John N. Craft, H. L. Griffin and Wm. H. Sullivan, G. B. Shawhan and Jas. K. Glennon, of said State and county, are held and firmly bound unto Benjamin F. Jackson, as clerk of the circuit court of Mobile county, in the sum of five hundred dollars, being the amount fixed by the judge of said court to supersede the judgment in the cause of Jetta
9 Simon against the said John N. Craft to be paid to the said B. F. Jackson, as clerk as aforesaid, or his successor in office; for which payment, well and truly to be made, we bind ourselves and our heirs, executors, or administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 1st day of February, A. D. 1896.

The condition of the above obligation is such that whereas Jetta Simon recovered of the said John N. Craft, at the fall term, 1895, of the circuit court of Mobile county, in an action of ejectment therein pending in her favor and against said Craft for the real property described in the complaint in said case, for the recovery and possession of which judgment was rendered by said court on the 15th of January, 1896, and from which judgment the said John N. Craft has taken an appeal to the supreme court of Alabama, returnable to the first Monday of March, 1896:

Now, if the said John N. Craft will prosecute to effect the said appeal and pay all such costs and damages as any party aggrieved may sustain by reason of the wrongful appeal and suspension of the said judgment, then this obligation to be void; else to be and remain in full force and effect.

JOHN N. CRAFT. [SEAL.]
H. L. GRIFFING. [SEAL.]
WM. H. SULLIVAN. [SEAL.]
G. B. SHAWHAN. [SEAL.]
JAS. K. GLENNON. [SEAL.]

Filed in office February 4th, 1896.

B. F. JACKSON, *Clerk.*

Bond.

STATE OF ALABAMA, }
County of Mobile. }

Know all men by these presents that we, John N. Craft, H. L. Griffin and Wm. H. Sullivan, G. B. Shawhan and Jas. K. Glennon, of said State and county, are held and firmly bound unto Jetta Simon in the sum of eight hundred and twenty-four dollars, to be paid to the said Jetta Simon, her certain attorneys, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, and our heirs, executors, or administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 1st day of February, A. D. 1896.

10 The condition of the above obligation is such that whereas the said Jetta Simon recovered of the said John N. Craft, at the fall term, 1895, of the circuit court of Mobile county, in an action of ejectment therein pending in her favor and against said Craft, the sum of four hundred and twelve dollars for the rent of the premises therein sued for and described, for which judgment was rendered by said court on the 15th day of January, 1896, and from which judgment the said John N. Craft has taken an appeal to the supreme court of Alabama, returnable to the first Monday of March, 1896:

Now, if the said John N. Craft will prosecute to effect the said appeal or if he fail therein to pay such judgment as the supreme court may render in the premises, then this obligation to be void; else to be and remain in full force and effect.

JOHN N. CRAFT. [SEAL.]
H. L. GRIFFING. [SEAL.]
WM. H. SULLIVAN. [SEAL.]
G. B. SHAWHAN. [SEAL.]
JAS. K. GLENNON. [SEAL.]

Filed in office February 4th, 1896.

B. F. JACKSON, *Clerk.*

Citation in Appeal.

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court.

To the sheriff of Mobile county, Greeting:

Whereas at a term of the circuit court of Mobile for Mobile county, held on the fourth Monday after the fourth Monday in October, 1895, in a certain cause in said court wherein Jetty Simon was plaintiff and John N. Craft was defendant, a judgment was rendered against said John N. Craft, to reverse which judgment the said John N. Craft on the 1st day of February, 1896, applied for and obtained from this office an appeal, returnable to the next term of our supreme court of the State of Alabama, to be held at Montgomery on the first Monday of March next, and the necessary bond having been given by the said John N. Craft, as principal, with H. L. Griffing, Wm. H. Sullivan, G. B. Shawhan, & Jas. K. Glennon, as sureties:

Now, you are hereby commanded, without delay, to cite the said Jetty Simon or G. L. & H. T. Smith, her attorneys, to appear
11 at the next term of our said supreme court to defend against the said appeal, if she or they think proper.

Witness B. F. Jackson, clerk of the circuit court of said county, this 17th day of February, A. D. 1896.

Attest:

B. F. JACKSON, *Clerk.*

Sheriff's Return.

Received February 17, 1896, and on the same day I served a copy of the within citation in appeal on G. L. and H. T. Smith by serving on G. L. Smith, Esq.

P. B. DORLAN, *Sheriff.*
ED. HARRIS, *D. S.*

Certificate of Appeal.

JETTY SIMON
vs.
JOHN N. CRAFT.

I, B. F. Jackson, clerk of the circuit court of Mobile county, State of Alabama, do hereby certify that in the above-entitled cause a judgment was rendered by the circuit court of Mobile county, Alabama, in favor of Jetty Simon and against John N. Craft, on the 15th day of January, A. D. 1896, for the land sued for in this cause and for the sum of four hundred and twelve $\frac{0}{100}$ dollars, besides costs of court, and that on the 1st day of February, 1896, John N. Craft applied for and took an appeal from said judgment and entered into bond with H. L. Griffing, W. H. Sullivan, G. B. Shawhan, and James K. Glennon, as sureties, in the sum of eight hundred and twenty-four dollars, which appeal was made returnable to the first Monday in March, 1896, as of the fall or November term, 1895, of the supreme court of Alabama, and that all further proceedings in said cause were suspended.

Witness my hand this the 20th day of February, A. D. 1896.

B. F. JACKSON, *Clerk.*

Filed in office Febr'y 20, 1896.

B. F. JACKSON, *Clerk.*

12 *Certificate of Reversal.*

THE STATE OF ALABAMA,
Judicial Department.

The Supreme Court of Alabama, November Term, A. D. 1898.

To the clerk of the circuit court of Mobile county, Greeting:

Whereas the record and proceedings of the circuit court of said county in a certain cause lately pending in said court between John N. Craft, appellant, and Jetta Simon, appellee, wherein, by said court, at the —— term, 189–, it was considered adversely to said appellant, were brought before our supreme court, by appeal taken, pursuant to law, on behalf of said appellant:

Now, it is hereby certified that it was thereupon considered by our supreme court on the 28th day of June, 1897, that said judgment of said circuit court be reversed and annulled and the cause

remanded to said court for further proceedings therein. It is also considered that the appellee pay the costs accruing on said appeal in this court and in the court below.

Witness R. F. Ligon, Jr., clerk of the supreme court of Alabama, at the capital, this the 14 day of November, 1898.

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of Alabama.

THE STATE OF ALABAMA, }
Mobile County. }

Filed this 17th day of Nov., 1898.

B. F. JACKSON, *Clerk.*

Judgment.

At a regular term of the circuit court of Mobile county, State of Alabama, begun and held in the city of Mobile on the 21st day of November, A. D. 1898, the same being the 4th Monday after the 4th Monday in October, A. D. 1898, the Honorable William S. Anderson, judge of the thirteenth judicial circuit of the State of Alabama, present and presiding, and on the 13th day of December, A. D. 1898, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

JETTY SIMON *vs.* JOHN N. CRAFT, Substituted Defendant in Place of Charles H. Brown, Original Defendant.	Jury Find the Defendant Not Guilty.

13 This day came the parties, by their attorneys, and issue having been joined between the plaintiff and defendant, thereupon came a jury of good and lawful men, to wit, Thos. Young and eleven others, who, having been duly empanneled and sworn according to law *who* having heard the evidence and the charge of the court, upon their oaths do say, "We, the jury, find the defendant not guilty."

It is therefore ordered and adjudged by the court that the defendant go hence without day and have and recover of the plaintiff all costs in and about this behalf expended, for the recovery of which let execution issue.

Bill of Exceptions.

JETTY SIMON }
vs. }
JOHN CRAFT. }

Be it remembered that this cause coming on to be heard on this the thirteenth day of December, 1898, it being a day of the regular term of the circuit court of Mobile county, came the parties, by

their attorneys, and a jury having been duly selected, empanneled, and sworn, the plaintiff offered and read in evidence the following portion of an agreement entered into by and between the attorneys of record in said cause:

"This instrument witnesseth the following agreement of facts made and entered into by and between the plaintiff, Jetty Simon, and John N. Craft, substituted for Charles H. Brown, tenant as the intervening landlord in the above-entitled cause, viz., that is to say: It is admitted by all parties to this agreement, 1st, that the plaintiff, Jetty Simon, entered into the possession of the real estate which is the subject of this litigation, on the twenty-third day of May, 1872, under a deed, a copy of which is hereto attached, marked Exhibit 'A,' and made a part hereof and now referred to; and that said Jetty Simon continued in the actual and exclusive and adverse possession of said property, claiming the same under said deed until the sixth day of May, 1889. 2nd. It is further agreed between the said parties, that the said Charles H. Brown held the possession of said property at the time of the commencement of this suit as the tenant of the said John Craft, claiming the same
14 by no other title except as such tenant. 3rd. It is further agreed between said parties that said John Craft entered into the possession of said property under a deed executed to him May 17th, 1889, by Henry Simon and wife, a copy of which is hereto attached, marked Exhibit 'A 1' and made a part hereof and now referred to.

* * * * * * *

It is further agreed between said parties that all of the exhibits hereto attached are true and exact copies of the papers from which they purport to be copied, and shall be taken and treated in all respects upon the trial of this cause as if they were the original papers of which they purport to be copies, and as if their execution and identity had been proved on said trial by evidence in all respects as if they were the said originals themselves, and subject only to such objections as might be valid objections to the introduction of such originals properly authenticated or to the introduction of properly authenticated copies of such record or proceedings.

* * * * * * *

It is not agreed, however, that the facts stated in this agreement are either relevant or material as evidence in said cause, but this question must be settled by the court when said facts are offered in evidence by either party, should either party offer the same in evidence during the trial.

It is further agreed that said defendant, John N. Craft, has held possession of said premises under claim as owner thereof, under the conveyance of Henry J. Simon to him, claiming under said conveyance in good faith, and rented the same out for the years ending November 1st, 1894, 1895, 1896, at four hundred and twelve dollars (412.00) per year, and for the previous time since receiving said conveyance at four hundred and twenty-five dollars ($425.00)

per year; that said rent was the true rental value of said property for the time covered thereby, and that the rental value of said property has been four hundred dollars ($400.00) per annum from that date."

Made this the twelfth day of December, 1898.

(Signed) GREGORY L. & H. T. SMITH,
Attorneys for Plaintiff.
BESTOR & GRAY,
PILLANS, TORREY & HANAW,
Attorneys for the Defendant.

15 Said agreement so offered in evidence was a portion of an entire agreement subsequently offered in evidence and made a part of this bill of exceptions.

The plaintiff then offered & read in evidence a conveyance dated the twenty-third day of May, 1872, and attached to said agreement and marked Exhibit "A," a copy of which said conveyance is part of the exhibits to the agreement subsequently offered in evidence by the defendant.

Plaintiff also offered and read in evidence a conveyance executed May 17th, 1889, marked Exhibit "A 1," a copy of which is an exhibit to an agreement subsequently offered in evidence by the defendant.

The plaintiff here rested her case.

Thereupon the defendant, John Craft, through his attorneys, offered and read in evidence an agreement between the attorneys of record dated December 12th, 1898, together with several exhibits thereto; which said agreement and exhibits are as follows, viz:

Circuit Court of Mobile County.

JETTA SIMON *vs.* JOHN CRAFT, Intervening as the Landlord, Substituted for Charles H. Brown, Sued as Tenant, said Craft Being Now Sole Defendant as Landlord on His Own Motion.	No. 8330.

This instrument witnesseth the following agreement of facts made and entered into by and between the plaintiff, Jetta Simon, and John N. Craft, substituted for Charles H. Brown, tenant, as the intervening landlord in the above-entitled cause, viz., that is to say:

It is admitted by all parties to this agreement—

First.

That the plaintiff Jetta Simon entered *entered* into the possession of the real estate which is the subject of this litigation on the 23rd day of May 1872 under a deed, a copy of which is hereto attached marked Exhibit "A" and made a part hereof and now referred to,

and that said Jetta Simon continued in the actual and exclusive and adverse possession of said property claiming the same under said deed until the 6th day of May 1889.

16 Second.

It is further agreed between the said parties that the said Charles H. Brown held the possession of said property at the time of the commencement of this suit as the tenant of the said John Craft claiming the same by no other title except as such tenant.

Third.

It is further agreed between said parties that said John Craft entered into the possession of said property under a deed executed to him May 17th 1889 by Henry Simon and wife, a copy of which is hereto attached marked Exhibit "A" and made a part hereof and now referred to, and that the title thus obtained was acquired by said Henry Simon under a deed executed to him by Ralph G. Richards, purporting to act as the guardian of the said Jetta Simon, a copy of which is hereto attached marked Exhibit "B" and made a part hereof and now referred to, and under the proceedings referred to in said deed and which are hereinafter referred to, and that the said John Craft has held the possession of said property from the time of his said entrance thereupon until the present time under the claim that by virture of said deed and the proceedings referred to in said deed from Richards to Henry Simon he acquired the title of the said Jetta Simon to said property.

Fourth.

It is further agreed by and between said parties that Exhibit "C" hereto attached is a full, true and exact copy of all the proceedings in the probate court of Mobile county under which it is claimed by the said John Craft that the said Ralph G. Richards was the guardian of Jetta Simon and as such authorized to make said conveyance to Henry Simon.

Fifth.

It is further agreed between said parties that all of the exhibits hereto attached are true and exact copies of the papers from which they purport to be copied, and shall be taken and treated in all respects upon the trial of this cause as if they were the original papers of which they purport to be copies, and as if their execution and identity had been proved on said trial, in evidence, in all respects as if they were the said originals themselves and subject only to such objections as might be valid objections to the introduction of such originals properly authenticated, or to the introduction of
17 properly authenticated copies of such record or proceedings.

Pasted to the writ of arrest in the proceedings upon the inquisition of lunacy and upon the back of which writ of arrest is endorsed the sheriff's return hereinafter copied, is a letter, copy of which appears in Exhibit "E."

This copy is to be treated as the original paper from which it is copied and is to be subject only to such objections as it might be subject to had the original *had it* been offered in evidence.

Sixth.

That as matter of fact the jury which was empaneled and sworn in the inquisition proceedings instituted by Ralph G. Richards against Jetta Simon in the probate court of Mobile county, and which rendered the verdict which is relied upon by the defendant as conferring jurisdiction upon the probate court to appoint a guardian of Jetta Simon, consisted of the following persons, who then resided as hereinafter set forth, viz:—George Threefoot south side of Dauphin street three west of Broad street in the city of Mobile, Charles Stuart north side of Dauphin street two east of Bayou street in the city of Mobile, W. J. Jolly who resided in the county of Mobile but outside of the city limits, John F. McGovern south side of Dauphin street two west of Jackson street in the city of Mobile, E. Harney colored, west side of Broad street four south of Charleston street in the city of Mobile, John Pollard Junior, south side of Spring Hill avenue eleven east of Ann street in the city of Mobile, Charles Babbitt northeast corner of Hamilton and Canal streets in the city of Mobile, Henry Ortmann two hundred and six Dauphin street in the city of Mobile, William Fincher county of Mobile but who resided outside of the city limits, William Cox, northeast corner of Government and Broad streets in the city of Mobile, Fred W. Sheppard twelve St. Michael street in the city of Mobile, and W. R. Gerow number five North Jackson street in the city of Mobile.

It is further agreed that the said Jetta Simon resided, at the time of said proceedings for inquisition and at the institution thereof, upon the property which is now in controversy.

It is not agreed, however, that the facts stated in this agreement are either relevant or material as evidence in said cause but this question must be settled by the court when said facts are
18 offered in evidence by either party should either party offer the same in evidence during the trial.

It is further agreed that said defendant John N. Craft has held possession of said premises under claim as owner thereof under the conveyance of Henry J. Simon to him claiming under said conveyance in good faith and rented the same out for the years ending November 1st, 1894, 1895, and 1896 at $412.00 per year, and for the previous time since receiving said conveyance at $425.00 per year, that said rent was the true rental value of said property, for the time covered thereby, and that the rental value of said property has $400.00 per annum since that date.

Made this the 12th day of December, 1898.

GREGORY L. & H. T. SMITH,
Attorneys for Plaintiff.
PILLANS, TORREY & HANAW,
BESTOR & GRAY, *Att'ys for Def't.*

Ex. "A."

Culver to Simon. } Deed Book No. 40, N. S., pages 415 & 416.

This indenture made the 23rd day of May in the year of our Lord one thousand eight hundred and seventy-two between Eliza A. Culver & Warren F. Culver her husband of the county of Mobile & State of Alabama of the first part and Jetty Simon wife of S. Simon, of said county and State of the second part. Witnesseth that the said parties of the first part for and in consideration of the sum of five thousand dollars lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and the said party of the second part, her heirs, executors, and administrators, forever released and discharged from the same by these presents, have granted bargained sold, aliened, remised released, enfeoffed conveyed and confirmed and by these presents do grant bargain sell, alien remise, release, enfeoff, convey and confirm to the said party of the second part, her heirs, and assigns, forever.

All and singular that certain piece, parcel, or lot of land situated in the city of Mobile & county aforesaid, bounded and described as follows, to wit: Beginning at a point on the north line of Church street & west from the northwest intersection of Church &
19 Joachim streets & distant therefrom fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts running thence westerly along the northern line of Church street fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts, thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts thence easterly and parallel with Church street fifty-six feet and nine inches ($56\frac{9}{12}$ feet) or thereabouts thence to the point of beginning. Bounded south by Church street west by property of Mrs. Fitzsimmons, north by property of John Parham & east by property late of Mrs. L. Jones. It being the same premises conveyed to Mrs. Elizabeth B. Colomb by W. Jones & Mary L. Jones, his wife by deed dated 13th April 1869 & recorded in the probate office of the said county in Book 25 N. S. pp. 423, 424, & 425, & by Wm. J. Brooks & Guy Brooks his wife by deed dated 5th, April 1869 & recorded in said Book 25 N. S. page- 421, 422, & 423 & the same that were afterwards conveyed by said Mrs. Elizabeth B. Colomb & H. O. Colomb her husband to the said Mrs. Eliza A. Culver by deed dated the 9th, Aug. 1870 & recorded in said probate office in Book 28 N. S. pp. 65 & 66, together with the tenaments, hereditaments, rights, members, privileges, and appurtances unto the above mentioned and described premises, belonging or in anywise appertaining. To have and to hold the above granted and described premises with the appurtenances, unto the said party of the second part her heirs and assigns to the sole and proper use benefit and behoof of the said party of the second part, her heirs and assigns forever. And the said Eliza A. Culver

& Warren F. Culver her husband for themselves and their heirs the above-described and hereby granted and released premises and every part and parcel thereof, with the hereditaments and appurtenances, unto the said party of the second part her heirs and assigns against the said parties of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

ELIZA A. CULVER. [L. S.]
W. A. CULVER. [L. S.]

Sealed and delivered in presence of—
WM. M. LOOMIS.

20 THE STATE OF ALABAMA, }
Mobile County. }

I, Wm. M. Loomis, a justice of the peace for said county and State, hereby certify that Eliza A. Culver and Warren F. Culver, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily of the day the same bears date.

Given under my hand this twenty-second day of May, A. D. 1872.

WM. M. LOOMIS,
Justice of the Peace, Mobile County.

Stamps, $5.00.

Ex. A 1.

H. J. Simon & wife }
to
John N. Craft. }

This indenture made the seventeenth day of May in the year of our Lord one thousand eight hundred and eighty-nine between Henry J. Simon and Ida Simon his wife of Mobile, Alabama of the first part and John N. Craft of Mobile, Alabama of the second part witnesseth. That the said parties of the first part for and in consideration of the sum of four thousand dollars lawful money of the United States of America to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, an- the said party of the second part, his heirs executors and administrators, forever released and discharged from the same by these presents have granted, bargained sold, aliened remised, released enfeoffed, conveyed, and confirmed, and by these presents do grant bargain sell, alien, remise release, enfeoff convey and confirm, to the said party of the second part, his heirs and assigns forever, all, and singular, that certain piece or parcel or lot of land situated in the

city and county of Mobile Alabama, bounded and described as follows, to wit: Beginning at a point on the north line of Church street and west from the northwest intersection of Church and Joachim streets and distant therefrom fifty-six feet and nine inches or thereabouts, running thence westerly along the northern line of Church street fifty-six feet nine inches or thereabouts, thence
21 northerly and parallel with Joachim street eighty feet six inches or thereabouts thence easterly and parallel with Church street fifty-six feet and nine inches or thereabouts thence to the point of beginning; bounded south by Church street west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. Mary L. Jones, being the same premises conveyed to Elizabeth B. Colomb by W. Jones and Mary L. Jones his wife by deed dated 13th April, 1869, and recorded in the probate office of said county in Book N. S. pp. 423, 424 & 425, and by William J. Brooks and Guy Brooks his wife by deed dated 5th April, 1869, and recorded in said Book 25 N. S. pp. 421, 422, 423, and the same that were afterwards conveyed by said Mrs. Elizabeth B. Colomb and H. O. Colomb her husband to the said Mrs. Eliza A. Culver by deed dated the ninth August, 1870, and recorded in said probate office in Book 28 N. S. pp. 65 & 66 and being same property deeded to said H. J. Simon by Ralph G. Richards g'd'n of Jetta Simon a *non compos mentis* on May 11th, 1889. Together with all and singular the tenements, hereditaments, rights, members, privileges and appurtenances, unto the above mentioned and described premises belonging, or in anywise appertaining. To have and to hold the above granted and described premises, with the appurtenances unto the said party of the second part his heirs and assigns, to the sole and proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever. And the said Henry J. Simon for himself and his heirs, the above described and hereby granted and released premises and every part and parcel thereof, with the hereditaments and appurtenances unto the said party of the second part his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons, whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

HENRY J. SIMON. [SEAL.]
IDA SIMON. [SEAL.]

Sealed and delivered in presence of—

HENRY HANAW,
E. S. BARNES,
As to H. J. S.

THE STATE OF ALABAMA, }
Mobile. }

I, Henry Hanaw, a notary public in and for Mobile
22 county, Alabama, hereby certify that Henry J. Simon and Ida Simon, his wife, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this seventeenth day of May, A. D. 1889.

HENRY HANAW,
[SEAL.] *Notary Public, Mobile Co., Ala.*

STATE OF ALABAMA, }
Mobile County. }

I, Henry Hanaw, a notary public in and for said State and county, do hereby certify that on the 17th day of May, 1889, came before me the within-named Ida Simon, known to me to be the wife of Henry J. Simon, the within named, who, being examined separate and apart from the husband touching her signature to the within conveyance, acknowledged that she signed the same of her own free will and accord and without fear, constraints, or threats on the part of her husband.

In witness whereof I hereto set my hand this 17th day of May, 1889.

[SEAL.] HENRY HANAW,
Notary Public, Mobile County, Alabama.

Received in office for record May 18th, 1891.

Ex. B.

Richard, grd., }
to
Simon. }

STATE OF ALABAMA, }
Mobile County. }

Know all men by these presents that whereas I Ralph Richard, guardian of Jetta Simon a *non compos mentis* legally appointed by an order of the honorable probate court of said county, made and entered on the 11th day of February 1889 was by a subsequent order and decree of said court, made and entered on the seventh day of March 1889, empowered to sell and convey certain real estate the property of his said ward; and whereas having given due notice of the intended sale, by publication previous to the sale for thirty days for four consecutive weeks in the Mobile Item, a newspaper published in Mobile county of the time, place and terms of sale;
23 I did as such guardian sell at public outcry in front of the court-house, of said county at 12 o'clock noon on the 15th day of April 1889 to Henry Simon for the sum of five thousand

one hundred dollars, that being that highest and best bid for the same, the real estate of said Jetty Simon *non compos mentis*, described as follows: All and singular that certain piece or parcel or lot of land situated in the city and county of Mobile Alabama bounded and described as follows to wit: Beginning at a point on the north line of Church street and west from the northwest intersection of Church and Joachim streets and distant therefrom fifty-six feet and nine inches or thereabouts, running thence westerly along the northern line of Church street fifty-six feet nine inches or thereabouts thence northerly and parallel with Joachim street eighty feet six inches or thereabouts, thence easterly and parallel with Church street fifty-six feet and nine inches or thereabouts, thence to the point of beginning; bounded south by Church St. west by property of Mrs. Fitzsimmons, north by property of John Parham and east by property late of Mrs. Mary L. Jones.

Being the same premises conveyed to Elizabeth B. Colomb by W. Jones and Mary L. Jones his wife by deed dated 13th, April 1869 and recorded in the probate office of said county in Book N. S. pp. 423, 424 & 425 and by William J. Brooks and Guy Brooks his wife by deed dated 5th, April 1889 and recorded in said Book 25 N. S. at page- 421, 422 & 423 and the same that were afterwards conveyed by said Mrs. Elizabeth B. Colomb and H. O. Colomb her husband to the said Mrs. Eliza A. Culver by deed dated the ninth August, 1870, and recorded in said probate office in Book 28 N. S., pp. 65 & 66.

And whereas the said probate court by its decree rendered on the 11th day of May, 1889, confirmed the said sale and directed me the said Ralph G. Richards as guardian as aforesaid to convey by proper deed to said Henry J. Simon the purchaser all the right, title and interest which said Jetta Simon had and has in said lands at the time of said sale.

Now therefore in consideration of the payment of the said purchase price of said lands by said Henry J. Simon, the receipt whereof is hereby acknowledged, and by virtue of the power and authority vested in me by the said decree of the probate court made on the eleventh day of May 1889 and in obedience thereto, I do
24 hereby grant, bargain, sell and convey unto the said Henry J. Simon his heirs and assigns forever, all claims, right, title and interest which the said Jetta Simon had at the date of said sale and now has in and to the property aforesaid.

To have and to hold unto the said Henry J. Simon his heirs and assigns forever.

In witness whereof I as guardian aforesaid do hereunto set my hand and seal this 11th day of May, 1889.

RALPH G. RICHARD, [SEAL.]
Guardian of Jetta Simon.

STATE OF ALABAMA, }
Mobile County. }

I, Henry Hanaw, a notary public in and for said State and county, hereby certify that Ralph G. Richard, whose name is signed to the

foregoing conveyance as guardian of Jetta Simon, a *non compos mentis*, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 11 day of May, 1889.

HENRY HANAW,
Notary Public, Mobile County, Alabama.

Received in office for record May 14th, 1889.

EXHIBIT C.

In re JETTA SIMON, a Person of Unsound Mind.

Petition for Inquisition of Lunacy.

THE STATE OF ALABAMA, }
Mobile County. }

In Probate Court, Mobile County.

To the Honorable Price Williams, judge of said court:

Your petitioner, Ralph G. Richard, respectfully represents unto your honor that he is a friend to one Jetta Simon and of her family; that said Jetta Simon is a female of the age of forty-nine years, and resides at Mobile, and is of unsound mind and incapable of governing herself or of conducting and managing her affairs.

Wherefore your petitioner prays your honor to take cognizance of the matter of this his petition and appoint a day for hearing the same, and that such proceedings may be had as shall be necessary and proper to determine according to law in such case made whether or not the said Jetta Simon is a person of unsound mind.

RALPH G. RICHARD.

STATE OF ALABAMA, }
Mobile County. }

Before me personally appeared Ralph G. Richard, who, being duly sworn, deposes and says that he is fully informed of the allegations contained in the foregoing petition, and that he believes the same to be true, as therein stated.

RALPH G. RICHARD.

Sworn to and subscribed before me this 29th day of January, 1889.

HENRY HANAW,
Notary Public, Mobile Co., Ala.

Filed January 31st, 1889.

THOMAS KIERNAN, *Clerk.*

The verdict of the jury, endorsed upon the back of said petition, is as follows, viz:

"We, the jury, find Mrs. Jetta Simon to be of unsound mind.

"JOHN POLLARD, JR., *Foreman.*"

JETTA SIMON, an Alleged Lunatic.

JANUARY 30TH, 1889.

This day came Ralph G. Richard and filed his petition in due form and under oath, alleging that said Jetta Simon, a female resident of this county and of age, is of unsound mind and incapable of taking care of herself or of managing her affairs, and praying that the necessary proceedings may be had so as to have due inquiry and determination as to the truth of said allegation. It is therefore ordered that the 6th day of February, 1889, be appointed as a day for the hearing of said petition, and that a jury be drawn, as the law directs, for the trial of this issue. It is further ordered that a writ be issued to said sheriff requiring him to take the said Jetta Simon so that he have her in this court to be presented at said trial if consistent with the health and safety of said Simon.

26 EXHIBIT "C"—continued.

In the Matter of JETTA SIMON, Alleged *Non Compos Mentis*.

Writ.

STATE OF ALABAMA, }
Mobile County. }

In re Probate Court.

To the sheriff of said county:

Whereas Ralph G. Richard, as the friend of one Jetta Simon, hath this day filed his petition with the judge of said court, alleging that said Jetta Simon is a female lunatic, of the age of forty-nine years, and a resident of this county, and praying that an inquisition of lunacy may be made and had in due form of law to try the truth of said allegations and as — whether the said Jetta Simon is incapable of governing herself and of attending to her affairs; and whereas the judge of said court has by due order entered in the premises appointed the sixth (6th) day of February, 1889, for hearing said petition and for the due trial thereof:

Now, therefore, if it be consistent with the health and safety of said Jetta Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be empannelled to make said inquisition.

And have you then and there this writ with your return thereon as to how you have executed the same.

Witness Price Williams, Jr., as judge of said court, at office in the city of Mobile, this the 30th day of January, A. D. 1889.

PRICE WILLIAMS, JR., *Judge.*

Received January 31st, 1889, and on the same day I executed the within writ of arrest by taking into my custody the within-named Jetta Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety of the within-named Jetta Simon to have her present at the place of trial, and on the advice of Dr.

H. P. Hirshfield, a physician whose certificate is hereto attached she is not brought before the honorable court.

W. H. HOLCOMBE, *Sheriff*,
By WM. H. SHEFFIELD, *D. S.*

Mobile, February 5th, 1889.

27 EXHIBIT "E."

In the Matter of JETTA SIMON, Alleged *Non Compos Mentis.*

Certificate of Physician.

MOBILE, ALA., *Jan. 30th*, 1889.

To the sheriff of Mobile county, Ala.:

I, H. P. Hirshfield, a regular physician, practicing in Mobile county, Ala., hereby certify that I am acquainted with Mrs. Jetta Simon, and have examined her condition on yesterday and find that she is a person of unsound mind, and it would not be consistent with her health or safety to have her present in court in any matter now pending.

H. P. HIRSHFIELD, M. D.

Ex. "C"—cont'd.

In the Matter of JETTA SIMON, Alleged *Non Compos Mentis.*

Venire for 24 Jurors.

STATE OF ALABAMA, }
Mobile County. }

In re Probate Court.

To the sheriff of said county, Greeting:

You are hereby commanded to summon the following-named jurors:

1. L. McGlinn,	city.		
2. George W. Threefoot,	"	P. 1,	summoned.
3. John T. Mure,	Co.,	P. 2,	non-resident.
4. Charles Stuart,	city,	P. 2,	summoned.
5. W. J. Jolly,	Co.,	P. 3,	summoned.
6. John T. McGovern,	city,	P. 4,	summoned.
7. John Norville,	"		non-resident.
8. Charles D. Barnes,	"		left at residence.
9. Frank J. Keenan,	"		non-resident.
10. E. Harney (c.),	"	P. 5,	summoned.
11. Mordecai Roberts,	"		non-resident.
12. Alfred Waldauer,	"		non-resident.
13. Wm. H. Bryant, Ex.,	"		summoned.
14. John Pollard, Jr.,	"	P. 6,	summoned.
15. John M. Slaughter,	"		not found; absent from the city.

16. Charles Babbett, " P. 7, left at residence.
17. David E. French, " left at residence.
18. Henry Ortman, " P. 8, summoned.
19. William Fincher, Co., P. 9, summoned.
20. Henry L. Stoutz, Ex., city, summoned.
21. Wm. Cox, " P. 10, summoned.
22. Fred W. Sheppard, " P. 11, summoned.
23. W. R. Gerow, " P. 12, summoned.
24. Alex. Y. Howard, Ex., summoned.

—to enquire into the sanity of one Jetta Simon, an alleged lunatic, of this county, to be and appear in and before the said probate court on the 6th day of February, A. D. 1889, *to* 10 o'clock a. m., then and there to make inquisition and to try the question whether the said Jetta Simon is of an unsound mind and incapable from that cause of governing herself and of managing her affairs, as hath been alleged to the judge of said court by Ralph G. Richard in his
28 petition filed by him in said court as the friend of said Jetta Simon.

And have you then and there this writ, with your return thereon showing how you have executed the same.

Witness Price Williams, Jr., judge of said court, at office, in the city of Mobile, this the 2nd day of February, A. D. 1889.

PRICE WILLIAMS, JR., *Judge.*

Received February 2nd, 1889, and executed, as designated by memoranda made opposite the names herein.

Mobile, February 6th, 1889.

W. H. HOLCOMBE, *Sheriff,*
By WM. H. SHEFFIELD, *D'p'ty.*

Ex. C—cont'd.

Probate Court, February 6th, 1889.

JETTA SIMON, Alleged *Non Compos Mentis*, Estate of.

STATE OF ALABAMA, }
Mobile County. }

In the matter of petition to enquire into her lunacy.

To Fielding Vaughan, Esquire:

You are hereby notified that you have been appointed guardian *ad litem* of Jetta Simon, alleged *non compos mentis*, interested in a certain matter and proceeding in said court, entitled as appears in the caption hereof, and which comes up for hearing on the 6th day of February, A. D. 1889.

Witness Price Williams, Jr., judge of said court, at office, the 6th day of February, A. D. 1889.

Attest: FRANCIS KIERNAN, *Clerk.*

Feb'y 6th, 1889.—I hereby accept service of the above notice, and consent to act as guardian *ad litem* for Jetta Simon.

FIELDING VAUGHAN.

Filed Feb'y 6, '89.

P. WILLIAMS, JR., *Judge.*

Ex. C—continued.

In the Matter of the Petition of RALPH G. RICHARD to Declare Mrs. Jetta Simon *Non Compos Mentis.*

Answer of Fielding Vaughan, Guardian ad Litem for said Simon.

This day comes Fielding Vaughan, and as guardian *ad litem* for Jetta Simon, an alleged lunatic, for answer to the petition of Ralph G. Richard, says that he wholly denies all the matters and things stated and contained in said petition, and requires strict proof to be made thereof according to law.

29 Feb'y 6th, 1889.

FIELDING VAUGHAN,
Guardian ad Litem for Jetta Simon.

Filed Feb'y 6 '89.

P. WILLIAMS, JR., *Judge.*

Ex. C—continued.

JETTA SIMON, Lunatic.

STATE OF ALABAMA, }
Mobile County. }

Probate Court of said County.

FEBRUARY 6TH, 1889.

This being the day appointed, by reference to an entry thereof made upon the minutes of the court on the 30th of January, 1889, for the hearing of the petition of Ralph G. Richard, filed, alleging the lunacy of the said Jetta Simon and praying an inquisition thereof, and it being shown that it would not be consistent with the health and safety of said lunatic to bring her into court at this time, and it appearing that due process had been served upon said lunatic notifying her of this proceeding, now comes the said Richard and a jury of good and lawful men, who reside in the county of Mobile, and who, having been summoned, to wit, John Pollock, Jr., and eleven others, who, having heard the evidence, the arguments of counsel, and the charge of the court in the premises, and being first duly tried, empannelled, and sworn well and truly to make inquisition of the facts alleged in said petition and a true verdict to render according to the evidence, upon their oath say, "We, the jury, find Mrs. Jetta Simon to be of unsound mind."

It is ordered, adjudged, and decreed by the court that said petition and all other proceedings thereon, together with the aforesaid verdict of said jury declaring the said Jetta Simon a lunatic, be recorded.

Ex. C—conti'd.

JETTA SIMON, *Non Compos Mentis*, Estate of.

Appointment of Guardian.

FEBRUARY 11TH, 1889.

This day comes Ralph G. Richard and applies for letters of guardianship over the estate of said lunatic, and he now entering into bond and security in the sum of $7,000.00, with H. J. Simon and M. Goldstein as his sureties, which bond, with said securities, has been taken and approved by the judge of this court, it is ordered and decreed that letters of guardianship over the estate of said Jetta Simon, lunatic, issue to Ralph Richard.

30 Ex. C—cont'd.

STATE OF ALABAMA, }
Mobile County. }

Know all men by these presents that we, Ralph G. Richard, H. J. Simon, & M. Goldstein, all of the county of Mobile, are held and firmly bound unto Price Williams, Jr., judge of the probate court in and for the county of Mobile, and his successors in office, in the sum of seven thousand ($7,000.00) dollars, to be paid to the said judge or his successor in office; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 11th day of February, in the year of our Lord eighteen hundred and eighty-nine.

The conditions of the above obligation are such that whereas the above-bound Ralph G. Richard has been duly appointed guardian over the person and estate of Jetta Simon, *non compos mentis:*

Now, if the said Ralph G. Richard shall well and truly perform all the duties which are or may be by law required of him as such guardian, then the above obligation to be void; otherwise to remain in full force.

RALPH G. RICHARD. [SEAL.]
H. J. SIMON. [SEAL.]
M. GOLDSTEIN. [SEAL.]

Taken and approved 11th day of February, A. D. 1889.
P. WILLIAMS, JR., *Judge.*

Ex. C—cont'd.

THE STATE OF ALABAMA, }
Mobile County. }

Whereas on the eleventh (11th) day of February, 1889, Ralph G. Richard was by the honorable the probate court of Mobile county, State of Alabama, appointed guardian over the person and estate of Jetta Simon, *non compos mentis*, and the said Ralph G. Richard

having complied with the requisites of the law in such cases made and provided, these are therefore to give said Ralph G. Richard, in whose fidelity in this behalf we very much confide, full power and authority to demand, receive, and secure, all and singular, the estate and all debts, dues, and demands whatsoever to said minor belonging, and to do all other acts and things concerning said guardianship in as full and complete a manner as if the same was herein particularly expressed.

Witness Price Williams, Jr., judge of said court, this 11th day of February, 1889.

P. WILLIAMS, JR., *Judge.*

31 Ex. C—cont'd.

In re JETTA SIMON, a *Non Compos Mentis.*

Inventory of Estate of Ward. Filed by Guardian of Ward.

THE STATE OF ALABAMA, }
Mobile County. }

Probate Court.

Inventory of the estate of Jetta Simon, a *non compos mentis.*

There is no personal property of said Jetta Simon, except wearing apparel, that has come to the hands of the guardian.

There is only one piece of real estate, described as follows:

"Beginning at a point on the north line of Church street and west from the northwest intersection of Church and Joachim street and distant therefrom fifty-six feet and nine inches or thereabouts, running thence westerly along the northern line of Church street fifty six feet and nine inches or thereabouts; thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts; thence easterly and parallel with Church street fifty-six feet and nine inches or thereabouts; thence to the point of beginning.

Bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. Mary L. Jones, it being the same premises conveyed to Mrs. Elizabeth B. Colomb by W. Jones and Mary L. Jones, his wife, by deed dated 13th April, 1869, and recorded in the probate office of said county, in Book 25, N. S., pp. 423, 424, & 425, and by Wm. J. Brooks and Guy Brooks, his wife, by deed dated 5th April, 1869, and recorded in said Book 25, N. S., at pages 421, 422, and 423, and the same that were afterwards conveyed by said Mrs. Elizabeth B. Colomb and H. O. Colomb, her husband, to the said Mrs. Eliza A. Culver by deed dated the 9th Aug., 1870, and recorded in said probate office, in Book 28, N. S., pp. 65 & 66," said property being in Mobile, Mobile county, Alabama.

THE STATE OF ALABAMA, }
Mobile County. }

Before me, Francis Kiernan, clerk of the probate court in & for said county & State, personally appeared Ralph G. Richard, guardian

of said estate of Jetta Simon, a *non compos mentis*, who, being duly sworn, doth depose and say that the foregoing is a full and complete inventory of the estate of his said ward, consisting only of real estate, which has come to his knowledge or possession.

32 RALPH G. RICHARD.

Sworn and subscribed before me this 12th day of February, A. D. 1889.

FRANCIS KIERNAN, *Clerk.*

Filed February 12th, 1889.

F. KIERNAN, *Clerk.*

Ex. C—cont'd.

In re JETTA SIMON, a *Non Compos Mentis.*

Petition for Sale of Property by Guardian.

THE STATE OF ALABAMA, }
Mobile County. }

In Probate Court, Mobile County.

To the Honorable Price Williams, judge of said court:

Your petitioner, Ralph G. Richard, guardian, duly appointed and qualified in said court, of Jetta Simon, a person of unsound mind, respectfully represents unto your honor that his said ward owns no personal property, as he is informed and believes, except her wearing apparel and a few pieces of household furniture of little value, probably not exceeding a hundred dollars, and has no real estate, except the house and lot as shown by the inventory filed in this court, and which is described as follows:

"Beginning at a point on the north line of Church street and from the northwest intersection of Church and Joachim street and distant therefrom fifty-six feet and nine inches or thereabouts, running thence westerly along the northern line of Church street fifty-six feet and nine inches or thereabouts; thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts; easterly and parallel with Church street fifty-six feet and nine inches or thereabouts; thence to the point of beginning, bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. Mary L. Jones, it being the same premises conveyed to Mrs. Elizabeth B. Colomb by W. Jones and Mary L. Jones, his wife, by deed dated 13th April, 1869, and recorded in the probate office of said county, in Book 25, N. S., pp. 423, 424, & 425, and by William J. Brooks and Guy Brooks, his wife, by deed dated 5th April, 1869, and recorded in said Book N. S., No. 25, at pages 421, 422, & 423, and the same that were afterwards conveyed by said Elizabeth B. Colomb and H. O. Colomb, her husband, to the said Mrs. Eliza A. Culver by deed dated the 9th of August, 1870, and recorded

33 in said probate office, in Book 28, N. S., pp. 65 & 66," said property being in Mobile, Mobile county, Alabama.

And your petitioner further shows unto the court that his said ward is a widow and has five children, of whom three are minors, as follows:

Charles Simon, aged about 20 years.
Florence Simon, aged about 13 years.
Nathan Simon, aged about 10 years.

She has also two adult sons, but these are able to and are supporting and maintaining themselves.

And your petitioner shows further unto the court that the said ward is, as he is informed and believes, indebted in a very large sum to Henry J. Simon, which indebtedness was for the support and maintenance of the said ward and her family, and was created before the inquisition of lunacy against her and the appointment of your petitioner as her guardian, and the same, as your petitioner is informed and believes, amounts to about $7,000.00.

Your petitioner shows unto the court that the gross income from the property of his said ward, amounting to only about $350.00 per annum, from which must be paid insurance premiums and taxes, is insufficient either to pay the debt aforesaid or to support and maintain the said ward and her family and to educate her children.

Your petitioner represents that in order to do this it will be necessary to sell said real property hereinbefore described and to apply the proceeds of such sale for the payment of the debts aforesaid and for the support and maintenance of his said ward and her family.

And your petitioner further states to the court that he is advised and believes that the indebtedness to the said H. J. Simon is the only debt owing by his said ward, and that the same can be settled and compromised for any sum over and above $2,000.00 that the said house and lot would sell for not exceeding the amount of his debt; that the said $2,000.00, being such homestead exemption as is allowed her by law, can then be set aside for his said ward and for the support and maintenance of herself and family.

In consideration of all of which your petitioner prays for an order and leave to sell said lot of land with the improvements, and that a day be set for hearing the matter of this petition and such proof as may be submitted in the premises, and that all such orders
34 and decrees may be made as may be requisite to have such sale in legal form.

RALPH G. RICHARD,
G'd'n Jetta Simon, Non Compos Mentis.

Subscribed and sworn to before me this 12th day of February, 1889.

FRANCIS KIERNAN, *Clerk.*

Filed February 12th, 1889.

F. KIERNAN, *Clerk.*

Ex. C—cont'd.

JETTA SIMON, *Non Compos Mentis.* Estate of.

STATE OF ALABAMA, }
Mobile County. }

Probate Court.

FEBRUARY 12TH, 1889.

In the matter of petition to sell lands to pay debts & support of ward's family.

To Fielding Vaughan, Esquire:

You are hereby notified that you have been appointed guardian *ad litem* of Jetta Simon, *non compos mentis;* Florence Simon, & Nathan Simon, minors, under 14 years of age, who are minors interested in a certain matter and proceeding in said court entitled as appears in the caption hereof, and which comes up for hearing on the 7th day of March, 1889.

Witness Price Williams, Jr., judge of said court, at office, the 12 day of February, A. D. 1889.

Attest: F. KIERNAN, *Clerk.*

Feb'y 13th, 1889.—I hereby accept service of the foregoing notice, & consent to act as guardian *ad litem* for said ward in the above matter.

FIELDING VAUGHAN.

Ex. C—cont'd.

In the Probate Court of Mobile County.

In the Matter of the Application of RALPH G. RICHARD, as Guardian of Jetta Simon, a *Non Compos Mentis*, to Sell Lands to Pay Debts and to Support and Maintain Ward's Family.

This day comes Fielding Vaughan, the guardian *ad litem* for said ward, and denies the matters and things set out and statements contained in said application, and requires proof thereof to be made in strict accordance with law.

FIELDING VAUGHAN,
Guardian ad Litem for Jetta Simon.

Filed Feb'y 13, '89.

F. KIERNAN, *Clerk.*

35 Ex. C—cont'd.

JETTA SIMON, *Non Compos Mentis*, as to Sale of Lands to Pay Debts.

FEBRUARY 12, 1889.

This day comes Ralph G. Richard, the guardian of said lunatic, and represents in writing and under oath that his ward does not own sufficient personal property to pay the debts. Wherefore he applies for the sale of certain real estate in his petition described for

that purpose. Said lunatic has five children living, three of whom are minors, viz:

Charles Simon, 20 years of age; Florence Simon, 13 years of age; Nathan Simon, 10 years of age. Her two adult sons are able to care for themselves. It is therefore ordered that the 7th day of March, 1889, be, and it is hereby, appointed for hearing the said application and the proofs which may be submitted in support of the same.

It is further ordered that Fielding Vaughan be, and he is hereby, appointed guardian *ad litem* to represent and protect the minors interested in this proceeding.

Ex. C—cont'd.

STATE OF ALABAMA, }
Mobile County. }

In the Probate Court of Mobile County.

Deposition of Henry J. Simon, a witness sworn and examined at the time and place hereinafter stated, in Mobile, in said State and county, under and by virtue of the annexed commission issued out of the probate court of Mobile, in a certain cause therein pending, wherein Ralph G. Richard, as guardian of Jetta Simon, is petitioner to sell land for payment of debts and support and maintenance of her family.

The said witness, being first duly sworn by me at the office of H. J. Simon & Co., in said city, on the 1st day of March, 1889, doth depose and say as follows:

To the direct intgys he says:

To the first intgy.: 1. My name is Henry J. Simon; I am twenty-nine years of age, and I reside in the city of Mobile, Ala.; I am now engaged in the retail clot-ing business at Pensacola, Florida, though from 1879 until now have been in the wholesale business in Mobile, except for one year—in 1886—when I was in business at Baltimore, Md.; I am the oldest son of Jetty Simon, who is a widow.

She owns a house and lot in Mobile, which is the only property she possesses; she has no income.

Said property is situated on Church street, second west of
36 Joachim street, in the city of Mobile.

This property, in my opinion, is worth four thousand dollars ($4,000.00).

Its rental value is three hundred & fifty dollars ($350.00) per annum.

I support Jetty Simon and her family.

The said family consists of said widow & two minor children.

The minor children are named Florence and Nathan, aged respectively thirteen and ten years, both of whom live with their mother.

My mother has no income or revenue outside of the rental of her property.

Neither of the minor children have any source of income or revenue.

It is absolutely necessary to sell her house and lot, as she would otherwise not be able to maintain and educate her children without assistance or charity from others.

2. My mother is indebted to me to the amount of ($5,703.95) five thousand seven hundred and three & $\frac{95}{100}$ dollars, the same being the amount of disbursements for her support & maintenance by me, as shown by my private books. I herewith attach a statement of the account, showing amounts advanced for her & children, marked Exhibit A.

These disbursements were made by me at her request.

When I first began paying the expenses of my mother's household I did it at the request of herself.

I have until now continued to make said disbursements.

Jetty Simon and her family are not keeping house.

Jetty Simon and her minor children board with me.

I have never received any board nor do I now receive any board from Jetty Simon and family, except as shown by my account hereto attached.

Before Jetty Simon boarded with me her household was managed by nurses and servants, while I advanced the necessary expenses of living, tuition, medical attendance, taxes, &c.

The minor children are now living with me.

3. Jetty Simon's present mental condition is a form of insanity termed by her physicians as acute melancholia.

She is utterly unable to manage her affairs or take care or charge of her family.

37 She requires extraordinary care and attention.

She has no other personal property excepting a limited wardrobe and a few household articles of furniture.

The amount I claim from her is true, correct, and unpaid.

HENRY J. SIMON.

To the cross-interrogatories the said witness, HENRY J. SIMON, says as follows:

To the first cross he saith:

Cross 1. My father died in April, 1879.

One of Jetty Simon's minor children is a boy named Nathan, aged 10 years, who is unable to support himself and has never earned a living.

Cross 2. My claim against Jetty Simon is computed from my books, which show exactly by months the amounts actually paid out by me each year and which were recorded at the time of payment. From this record I have obtained the exact amount I paid out for the support of herself and minor children.

The expenses varied each year.

The most expensive year was May, 1885, to May, 1886.

The least costly year was from May, 1881, to May, 1882.

The cause of the former increase was due to extensive repairs to property, heavy doctor bills, &c.

The small expense was due to my mother's ability to manage her domestic affairs herself, being then in sound health and mind.

I have kept a record of the family's expense since I rented the house.

During this period I have charged the family fifty dollars per month board.

I know this was a reasonable price for the board. I furnished the entire family.

The other expenses I have charged were for wearing apparel, doctor's bills, taxes, &c.

These sums were actually paid out by me.

Special tax for 1888 is unpaid and amounts to thirty-two & $\frac{55}{100}$ dollars.

Insurance to the amount of thirty-seven hundred and fifty dollars ($3,750.00) is carried, and expires December 1st, 1889.

I have credited Jetty Simon with ninety-three hundred
38 and seventy-eight & $\frac{71}{100}$ doll's (9,378.71).

The first credit was forty-two hundred & fifty-eight & $\frac{71}{100}$ dollars ($4,258.71), being the amount of merchandise she turned over to me, representing the half interest owned by my father in the business of M. Simon & Bro.

This was a reasonable value for the things received.

An inventory of the stock of merchandise was taken at the time and ascertained to be so much.

The second credit is for (350.00) three hundred and fifty dollars, being a reasonable rent for the house, and was ascertained by a comparison with the rents received from houses of a like nature and value.

The next credit is for (2,310.00), being board for myself from the date of my father's death until September, 1885.

The next credit is for ($2,460.00), being board for Jacob S. Simon from May 1st, 1879, until April 1st, 1886, and which I assumed and allowed as a credit to my mother.

These credits are reasonable and represent full value for the things received, and the values are fixed by comparison with the same values elsewhere.

I have not charged any interest on either side of my account against Jetty Simon.

If I had charged interest it would create a difference in my favor of twenty-five hundred & twenty-five & $\frac{79}{100}$ dollars ($2,525.79).

Cross 3rd. Jetty Simon owes no one else besides myself.

HENRY J. SIMON.

I, J. I. Clemmons, one of the commissioners in the annexed commission named, hereby certify that Henry J. Simon, the witness who is named in said commission, and who is personally well known to me, appeared before me on the day and at the place hereinbefore stated, and that he was by me first duly sworn according to law and examined on the annexed direct and cross interrogatories, and that he did in answer thereto testify and depose as is set down above, and that his said answers were reduced to writing by said witness

in his own writing and in my presence as the questions were asked him by me and in his own language; that he read over said answers and then and there subscribed them in my presence.

That said statement, hereto attached and marked as "Exhibit" A, is the same as attached by said witness and referred to in his answers.

39

And I further certify that I am neither of counsel nor of kin to any of the parties to the cause nor in anywise interested in the result thereof.

Given under my hand and seal this sixth day of March, A. D. 1889.

J. I. CLEMMONS, [SEAL.]
Commissioner.

Mrs. Jetty Simon, in account with Henry J. Simon, for expenditures made at her request for the support and maintenance of herself & minor children.

DR.

To paid out from May 1st, 1879, to May 1, '80.	$2,061.15	
" " " " May 1, '80, " May 1, '81.	1,676.34	
" " " " May 1, '81, " May 1, '82.	1,106.28	
" " " " May 1, '82, " May 1, '83.	1,668.49	
" " " " May 1, '83, " May 1, '84.	1,953.27	
" " " " May 1, '84, " May 1, '85.	1,774.48	
" " " " May 1, '85, " Oct. 31, '85.	942.71	
" " " " Oct. 1, '85, " M'ch 31, '86.	1,246.78	
Cash remitted from Baltimore from Sep. 3rd, '86, to May 1, '87.....	1,048.16	
April 18, '87, to Feb'y 1, '88 (no claim made).		
" board for family Feb. 1, '88, to Feb. 1, '89.	600.00	
" wearing apparel, medical attendance, &c., for family.....	500.00	
" repairs to house & lot.....	400.00	
" insurance & taxes.....	105.00	
		$15,082.66

CR.

By stock of merchandise sold by Mrs. J. Simon to H. J. Simon, being ½ interest.....	$4,258.71	
By 1 year's house rent, from Feb. 1, '88, to Feb'y 1, '89.....	350.00	
By board for H. J. Simon from May 1, '79, 6 years & 5 months.....	2,310.00	
By board for J. S. Simon from May 1, '79, 6 years & 11 months.....	2,460.00	
		9,378.71
Balance due H. J. Simon.....		$5,703.95

HENRY J. SIMON.

"Exhibit 'A,' J. I. Clemmons, com'r."

Ex. "C"—cont'd.

In Probate Court, Mobile County.

In the Matter of the Application of RALPH G. RICHARD, Guardian of Jetta Simon, a *Non Compos Mentis*, to Sell Land for the Payment of Debts and for the Support and Maintenance of Family of *Non Compos Mentis*.

Interrogatories to be Propounded to Henry J. Simon in the said Matter, the said Witness Being Produced by the said Applicant.

40 Direct interrogatories.

1st. Int. What is your name, age, and residence? What is now your business, and what has it been since 1879? How are you related to Jetta Simon? Is she a widow? What, if any, means of support and property has she? Where is the property situated? What, in your opinion, is said property worth? What is its rental value? Who now supports the said Jetta Simon and her family? Of whom does the family consist? State names and ages. Who of them live with the mother? Has the said Jetta Simon any income or revenue? Have any of her minor children any source of income or revenue? State whether it is necessary to sell the house and lot owned by her; and, if so, why. Would she be able to support and maintain herself and family and educate her children without aid from you or charity from others?

2nd. Is your mother, Jetta Simon, indebted to you? If you answer yes, then state how she became indebted and to what amount. Attach to your answer a statement showing such indebtedness. Who made the disbursements, as shown by your account hereto attached? Were they made by you or on your account? When you first began paying the expenses of Jetta Simon's household at whose request were such disbursements made? Have you continued to make them up to this time? Is said Jetta Simon and family keeping house? If not, with whom does she board? Do you now receive or have you in the past received anything for board, except as shown by your account hereto attached? Before the said Jetta Simon boarded with you, how was her household conducted, and who advanced the funds to pay necessary expenses of the family, tuition, doctor's bills, etc.? With whom are her minor children now living?

3rd. What is Jetta Simon's present mental condition? Is she able to manage her affairs and take charge of her family? Does she require more than ordinary care and attention? Has she any personal property other than wearing apparel and few articles of household furniture? Is the amount claimed by you from her true, correct, and unpaid?

PILLANS, TORREY & HANAW,
Attorneys for Applicant.

The applicant suggests Joseph I. Clemmons or John E. Mitchell as suitable persons to act as commissioners to take the deposition

of the said witness, the said Joseph I. Clemmons and John E. Mitchell and the said Henry J. Simon all residing in Mobile, Alabama.

41 PILLANS, TORREY & HANAW,
Attorneys for Applicant.

Filed Feb'y 13th, 1889.

P. WILLIAMS, JR., *Judge.*

Ex. C—cont'd.

In Probate Court, Mobile County.

In the Matter of the Application of RALPH G. RICHARD, Guardian of Jetta Simon, a *Non Compos Mentis*, to Sell Lands for Payment of Debts and for Maintenance of Ward's Family.

Cross-interrogatories to Henry J. Simon.

When did your father die? Are any of Mrs. Simon's minor children boys? If so, give their names and ages. Are such boys now able to support themselves, and how long have they so been able?

Do they now or have they ever in fact earned anything? How much?

2nd.

Is your statement of the debt you claim of Mrs. Simon itemized, estimated, or approximated? If neither, how was it made up? Were the sums charged in it against her actually paid out by you on her account? Did you keep a record of such charges and enter them as paid by you at the time of payment? Have you taken your statement from such a record or do you merely estimate the expense of maintaining the family for each year? Did such expenses vary from year to year or remain the same? Which was the most costly and which the least expensive year? What caused the difference? Have you kept a record of such expenses since you rented the house? During this latter period what board have you charged? Was that price reasonable for such board as you furnished? What have you charged for other expenses during that time, and were such sums actually paid out by you? Are any taxes unpaid? How much? How much insurance is carried, and when does it expire? Have you allowed Mrs. Simon any credits in your statement? How much is the first credit and for what was it allowed? Was it the reasonable value of the thing for which it was allowed? How was such value ascertained? How much and what is the 2nd credit? Is it the reasonable value of the thing for which it was allowed? How was such value ascertained? How much and what is each of the other credits? Is each reasonable and the full value of the thing for which it was given? How was the value of each fixed?

42 Have you charged any interest on either side of your account with Mrs. Simon? If not, calculate now and tell us

what difference it would make in the balance you claim of your mother.

3rd.

Does Mrs. Simon owe any other person than yourself? If so, whom, how much, and for what?

FIELDING VAUGHAN,
Guardian ad Litem for Mrs. Jetta Simon.

Filed Feb'y 15th, 1889.

FRANCIS KIERNAN, *Clerk.*

Ex. C—cont'd.

STATE OF ALABAMA, }
Mobile County. }

Probate Court.

In the Matter of RALPH G. RICHARD, Guardian of Jetta Simon, a *Non Compos Mentis*, to Sell Land for the Payment of Debts and for the Support and Maintenance of Family of *Non Compos Mentis.*

To Joseph I. Clemmons or John E. Mitchell, Esqrs., Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give you or any one of you, full power and authority to take the deposition of Henry J. Simon, witness on the part of the petitioner, in a cause pending in our said court, entitled as appears in the caption hereto, and therefore we command you or any of you that, at such time and place or times and places as you may appoint, you do cause the said Henry J. Simon to come before you or either of you and then and there examine him on oath on the interrogatories and cross-interrogatories annexed, and that you or either of you do take such examination and reduce the same into writing and return the same, annexed to this writ, closed up, under your seals or the seal of any of you, into our said probate court with all convenient speed, that the same may be read in evidence on the trial of the cause aforesaid.

Witness Price Williams, Jr., judge of said court, this 16th day of February, A. D. 1889.

43 Attest: PRICE WILLIAMS, JR., *Judge.*

Ex. C—cont'd.

In the Matter of the Petition of RALPH G. RICHARD, Guardian of Jetta Simon, a *Non Compos Mentis*, to Sell Lands for Payment of Debts Incurred before the Inquisition of Lunacy and for the Maintainence of the Family.

This day having been regularly appointed, less than 30 days and more than 20 days from the filing of the said petition, for the hearing thereof, the said petition alleging that the sale of the property

hereinafter described is necessary for the payment of debts of the said Jetta Simon, a *non compos mentis*, incurred before the inquisition of lunacy and for the maintenance of the said ward of said guardian and of said ward's family, now comes the petitioner, Ralph G. Richard, and moves the court for an order to sell, in accordance with said petition, the following-described real estate in said county, to wit: Beginning at a point on the north line of Church street and from the northwest intersection of Church and Joachim street- a distance therefrom fifty-six feet and nine inches or thereabouts, running thence westerly along the northern line of Church street fifty-six feet and nine inches or thereabouts; thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts, easterly and parallel with Church street fifty-six feet and nine inches or thereabouts; thence to the place of beginning; bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property of the late Mrs. Mary L. Jones, it being the same premises conveyed to Mrs. Elizabeth Colomb by W. Jones and Mary L. Jones, his wife, by deed dated April 13th, 1869, and recorded in the probate office of said county in Book 25, N. S., pp. 423 & 425, and by William J. Brooks and Guy Brooks, his wife, by deed dated 5th April, 1869, and recorded in said Book N. S., No. 25, at pages 421, 422, & 423, and the same that were afterwards conveyed by said Elizabeth B. Colomb and H. O. Colomb, her husband, to the said Mrs Eliza A. Culver, by deed dated the 9th of August, 1870, and recorded in said probate office in Book 28, N. S., pp. 65 & 66.

44 And also came Fielding Vaughan, Esqr., heretofore appointed guardian *ad litem* for the said Jetta Simon, who had been heretofore adjudicated *non compos mentis*, to represent and protect her interest in the matter of said petition and who has duly filed his answer in writing, as such guardian *ad litem*, denying the allegations contained in said petition and contesting the same, and the said matters alleged in said petition having been duly proven to the satisfaction of the court by the deposition of Henry J. Simon—

It is therefore ordered, adjudged, and decreed that the said petition be granted, and that the said property hereinbefore described be sold for the payment of the debts of the said Jetta Simon and the maintenance of herself and family, and the said Ralph G. Richard, guardian, is hereby ordered to sell the above-described land at public outcry in front of the court-house door, at Mobile, in said county, in manner and form as the law directs in such cases, after having first given notice for thirty days by advertisement for four consecutive weeks in some newspaper published in Mobile county of the time, place, and terms of sale, said sale to be for cash.

And it appearing that said property exceeds in value what said Jetta Simon would be entitled to claim as exempt, it *or* ordered that two thousand dollars out of the proceeds of said sale shall be set apart by said guardian and used for the security and maintenance of the said Jetta Simon — her family, and the excess over and

above the two thousand dollars be applied to the payment of the existing debts of the said Jetta Simon.

Mobile, Ala., March 7th, 1889.

"EXHIBIT E."

Certificate of Publication.

THE STATE OF ALABAMA, }
Mobile County. }

W. E. Clow, being duly sworn, deposes and says that he is the clerk of the Mobile Item, a newspaper published at Mobile, in the county of Mobile, in the State of Alabama, and that the notice of the guardian sale of Jetta Simon, Ralph G. Richard, g'd'n, a copy of which is hereunto attached, was first published on the 16th day of Mar., 1889, and was published in each weekly issue of said newspaper thereafter for the full period of 4 weeks, the last publication thereafter being in the issue dated the 6th day of Apr., 1889.

45 W. E. CLOW.

Sworn and subscribed to before me this — day of ——, 188–.

——— ———.

To the above paper is attached the following newspaper clipping, viz:

"*Notice of Guardian's Sale.*

Nat Strauss, auctioneer.

Under and by virture of an order and decree of the Honorable Price Williams, Jr., judge of the probate court of Mobile county, I will sell at public auction for cash, in front of the court-house door of Mobile county, Ala., on Monday, April 15th, 1889, at 12 o'clock noon, all and singular the following described property, situated in Mobile, Mobile county, Ala., and described as follows, to wit: 'Beginning at a point on the north line of Church street and from the northwest intersection of Church and Joachim street and distant therefrom fifty-six feet and nine inches or thereabouts, running thence westerly along the northern line of Church street fifty-six feet and nine inches or thereabouts; thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts; easterly and parallel with Church street fifty-six feet and nine inches or thereabouts; thence to the point of beginning, bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. Mary L. Jones, it being the same premises conveyed to Mrs. Elizabeth B. Colomb by W. Jones and Mary L. Jones, his wife, by deed dated 13th April, 1869, and recorded in probate office of said county in Book 24, N. S., pp. 423, 424, and 425, and by William J. Brooks and Guy Brooks, his wife, by deed dated 5th April, 1869, and recorded in said Book N. S. 25, at pages 421, 422, and 423, the same that were after-

wards conveyed by said Elizabeth B. Colomb and H. O. Colomb, her husband, to the said Mrs. Eliza A. Culver by deed dated the 9th of August, 1870, and recorded in said probate office in Book 28, N. S., pp. 65 & 66.'

RALPH G. RICHARD,
Guardian of Jetta Simon, a Non Compos Mentis."

11–4t.

EXHIBIT C—cont'd.

STATE OF ALABAMA, }
Mobile County. }

To the Hon. Price Williams, judge of probate of said county:

46 The undersigned, guardian of Jetta Simon, a *non compos mentis*, respectfully reports that in pursuance of an order heretofore made by said court on, to wit, the seventh day of March, 1889, authorizing the undersigned to sell certain realty belonging to his said ward, after having given due and legal notice for thirty days by advertising the same for four consecutive weeks in the Mobile Item, a newspaper published in Mobile county, previous to the day of sale, setting forth the time, place, and terms of sale, on Monday, the 15th day of April, 1889, the day and at the place appointed for said sale, did offer said realty for sale at public outcry, and at said sale Henry J. Simon, being the highest, best, and last bidder therefor, became the purchaser of all and singular that certain piece, parcel, or lot of land situated in the city and county of Mobile, Alabama, bounded and described as follows, to wit: Beginning at a point on the north line of Church street and west from the northwest intersection of Church and Joachim streets and distant therefrom fifty-six feet and nine inches or thereabouts, running thence northerly and parallel with Joachim street eighty feet and six inches or thereabouts; thence easterly and parallel with Church street fifty-six feet and nine inches or thereabouts; thence to the place of beginning, bounded south by Church street, west by property of Mrs. Fitzsimmons, north by property of John Parham, and east by property late of Mrs. Mary L. Jones, it being the same premises conveyed to Mrs. Elizabeth B. Colomb by W. Jones and Mary L. Jones, his wife, by deed dated 13th April, 1869, and recorded in the probate office of said county, in Book 25, N. S., pp. 423, 424, & 425, and by William J. Brooks and Guy Brooks, his wife, by deed dated 5th April, 1869, and recorded in said Book 25, N. S., at pages 421, 422, & 423, and the same that were afterwards conveyed by said Mrs. Elizabeth B. Colomb and H. O. Colomb, her husband, to the said Mrs. Eliza A. Culver, by deed dated the ninth August, 1870, and recorded in said probate office in Book 28, N. S., pp. 65 & 66, at the price of $ five thousand and one hundred dollars.

The said guardian further reports that said Henry J. Simon has complied with the terms of said sale, and has paid in cash the entire amount of said purchase-money, and that said sale was fairly conducted, and that said realty was sold for an amount equal to the fair value of the land. Wherefore the undersigned, as said

guardian, respectfully prays that said sale be in all things
47 confirmed and made good, and that an order be granted authorizing him as such guardian to execute titles to the said Henry J. Simon for the said real estate purchased by him as aforesaid.

All of which is respectfully submitted.

RALPH G. RICHARD.

Sworn and subscribed before me this sixth day of May, 1889.

FRANCIS KIERNAN, *Clerk.*

Filed May 6th, 1889.

F. KIERNAN, *Clerk.*

Ex. C—cont'd.

JETTA SIMON, *Non Compos Mentis.*

Report of Sale of Real Estate.

MAY 6TH, 1889.

This day comes Ralph G. Richard, the guardian of said *non compos mentis*, and represents, in writing and under oath, that on the 15th day of April, 1889, in obedience to the order of this court, he proceeded and sold at public outcry, in front of the court-house of said county, the real property of said *non compos mentis*, fully described in the order of sale, and that Henry J. Simon became the highest and best bidder for the sum of $5,100.00. It is ordered that said report of sale be set for consideration on the 11th of May, 1889.

Ex. C—cont'd.

JETTA SIMON, *Non Compos Mentis*, Estate of.

Report of Sale.

MAY 11TH, 1889.

This day comes Ralph G. Richards, guardian of said Jetta Simon, and files his report in writing and under oath, setting forth, among other things, that on Monday, the 15th day of April, 1889, within the legal hours of sale and in strict accordance with all and singular the terms and requirements of the former order and decree of this court granted and entered in the premises on the 7th day of March, 1889, he proceeded and sold at public outcry, in front of the court-house in this county, the lands set forth and particularly described in said former order and decree, and that said land was purchased at said sale by Henry J. Simon for the sum of five thousand and one hundred dollars; and it appearing to the satisfaction of the court from said report and the evidence now therewith submitted that said sale was fairly conducted, that said amount *was* paid for
said land by said Henry J. Simon was the highest and best
48 bid for the same, and that the said sum so paid is equal to the fair value of said lands, and that the terms of sale as pre-

scribed by the court have been complied with, and that the purchase-money has been paid, it is ordered, adjudged, and decreed that the said sale be, and the same is hereby, approved and in all things ratified and confirmed by the order and authority of this court.

It is further ordered, adjudged, and decreed that the said Ralph G. Richard as such guardian, as aforesaid, be authorized, and he is hereby ordered, to convey by proper deed to the said Henry J. Simon all right, title, and interest which the said Jetta Simon, his ward, had in such lands at the time of said sale.

It is further ordered that said report and all other papers on file relating to this proceeding be recorded.

It is further ordered that said guardian pay the costs of this proceeding to be allowed to him out of the estate of his said ward.

When the said agreement and exhibits were offered, as aforesaid, by the defendant the plaintiff objects to the proceedings had in the probate court to decree Jetty Simon a lunatic, because said proceedings did not constitute due process of law:

1st. In that there was no process issued notifying Jetty Simon to be present at the trial of the inquest of lunacy that was held.

2nd. In that no provision was made in or by said proceedings whereby said Jetty Simon might be present at the inquest of lunacy that was held.

3rd. In that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not.

4th. In that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy.

5th. In that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprived her of the opportunity to be heard at the inquest of lunacy.

6th. In that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy.

7th. Because the statute under which Jetty Simon was re-
49 strained of her liberty and deprived of her property is in conflict with article 5 — the amendment to the Constitution of the United States, which provides, "Nor be deprived of life, liberty or property without due process of law," and in conflict with article *IVX* of the amendment to said Constitution:

1*a*. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

2*a*. In that it authorizes a citizen to be deprived of his or her property without due process of law.

8th. Because said proceedings in the probate court are irrelevant and immaterial to any issue in the cause.

The court overruled the plaintiff's objections to said proceedings; to such ruling of the court the plaintiff then and there excepted.

Thereupon the defendant read in evidence said agreement to the jury, with the exhibits thereto attached.

This was all of the evidence in the cause.

The plaintiff then requested the court in writing to charge the jury as follows: "If the jury believe all of the evidence in the case they ought to find a verdict for the plaintiff for the lands described in the complaint."

The court refused to give said charge and endorsed its refusal thereon and signed such refusal, and to the refusal to give said charge the plaintiff excepted.

The defendant thereupon asked the court to charge the jury as follows: "If the jury believe all of the evidence in the case they ought to find a verdict for the defendant." The court gave said charge and endorsed the same as given and signed his name thereto, and to the giving of this charge at the instance of the defendant the plaintiff excepted.

The plaintiff now tenders this her bill of exceptions, and prays that the same may be allowed and signed in term time, which is accordingly done this the 30th day of December, 1898.

WM. S. ANDERSON,
Judge of the Circuit of Mobile County.

Filed in office December 30th, 1898.

B. F. JACKSON, *Clerk.*

50 *Security for Costs of Appeal.*

JETTA SIMON
vs.
JOHN N. CRAFT.

Security for costs upon appeal to the supreme court of Alabama.

We, Jetty Simon, S. Haas, and Walter Mitchell, acknowledge ourselves sureties for the costs of the appeal of Jetta Simon to the supreme court of Alabama from the judgment which was rendered in the circuit court of Mobile county against the said plaintiff in the above-entitled cause on the 13th day of December, 1898.

Witness our hands this the 20th day of January, 1899.

JETTY SIMON.
S. HAAS.
WALTER MITCHELL.

Filed in office February 20th, 1899.

B. F. JACKSON, *Clerk.*

Citation in Appeal.

THE STATE OF ALABAMA,
Mobile County.

Circuit Court.

To the sheriff of Mobile county, Greeting:

Whereas at a term of the circuit court of Mobile for Mobile county, held on the 4th Monday after the 4th Monday in October, 1898, in

a certain cause in said court wherein Jetty Simon was plaintiff and John N. Craft was defendant, a judgment was rendered against said Jetty Simon, to reverse which judgment the said Jetty Simon has on this day applied for and obtained from this office an appeal, returnable to the present term of our supreme court of the State of Alabama, to be held at Montgomery on the 13th day of March next, being the first Monday after the expiration of 20 days from date of appeal, and the necessary bond having been given by the said Jetty Simon, with S. Haas and Walter Mitchell, as sureties:

Now, you are hereby commanded, without delay, to cite the said John N. Craft or Bestor & Gray, attorneys, to appear at the present term of our said supreme court to defend against the said appeal, if they think proper.

Witness B. F. Jackson, clerk of the circuit court of said county, this 20th day of February, A. D. 1899.

Attest:

B. F. JACKSON, *Clerk.*

51 *Sheriff's Return.*

Received February 21, 1899, and on same day I served a copy of the within citation on Jas. W. Gray, one of the firm of Bestor & Gray.

CHAS. E. McLEAN, *Sheriff,*
By M. I. GOLDSMITH, *D. S.*

Certificate of Appeal.

In Circuit Court of Mobile County.

JETTY SIMON
v.
JOHN N. CRAFT, Substituted Defendant in Place of Charles H. Brown, Original Defendant.

I, B. F. Jackson, clerk of the circuit court in and for Mobile county, State of Alabama, do hereby certify that in the above-entitled cause a judgment was rendered by the circuit court in and for Mobile county, State of Alabama, in favor of John Craft, substituted defendant in place of Charles H. Brown, original defendant, and against Jetty Simon on the 13th day of December, A. D. 1898, for costs of court, and that on the 20th day of February, A. D. 1889, Jetty Simon applied for and took an appeal from said judgment and gave security for costs of appeal, with S. Haas and Walter Mitchell as security; which said appeal was made returnable to the 13th day of March next (being the first Monday after the expiration of 20 days from date of appeal) of the present term of the supreme court of the State of Alabama.

Witness my hand this the 28th day of February, A. D. 1899.

Attest:

B. F. JACKSON, *Clerk.*

Filed in office February 28th, A. D. 1899.

B. F. JACKSON, *Clerk.*

Clerk's Certificate to Transcript.

THE STATE OF ALABAMA, }
Mobile County. }

I, B. F. Jackson, clerk of the circuit court in and for said State and county, do hereby certify that the foregoing pages numbered from 1 (one) to 46 (forty-six), both inclusive, contain a full, true, and correct transcript of the record and proceedings had in the said circuit court in a certain cause therein lately pending, wherein Jetty Simon was plaintiff and John N. Craft, substituted defendant in place of Charles H. Brown, original defendant, was defendant, as the same remains of record in my office.

52

Seal Circuit Court, Mobile County, Ala.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office in the city of Mobile, this the 6th day of March, A. D. 1899.

B. F. JACKSON,
Clerk Circuit Court, Mobile County, Alabama.

53 *Assignments of Error.*

Now comes the appellant, Jetty Simon, and says that there is manifest error in the record and proceedings in the circuit court of Mobile county, and assigns the following errors, viz:

1st. The court erred in overruling the appellant's first objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

2nd. The court erred in overruling the appellant's second objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

3rd. The court erred in overruling the appellant's third objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

4th. The court erred in overruling the appellant's fourth objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

5th. The court erred in overruling the appellant's fifth objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

6th. The court erred in overruling the appellant's sixth objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

7th. The court erred in overruling the appellant's seventh objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 43).

8th. The court erred in overruling the appellant's eighth objection to the proceedings had in the probate court to decree Jetty Simon a lunatic (Record, page 44).

9th. The court erred in permitting the defendant, against the ob-

jection of the plaintiff, to read in evidence the said proceedings in the probate court (Record, page 44).

10th. The court erred in refusing the written charge requested by the plaintiff (Record, page 44).

11th. The court erred in giving the charge which was requested by the defendant, and by which it instructed the jury as follows, viz: "If the jury believe all of the evidence in the case, they ought to find a verdict for the defendant" (Record, page 44).

GREGORY L. & H. T. SMITH,
Attorneys for Appellant.

54 Supreme Court of Alabama, Wednesday, April 5, 1899, 1 Div., 19.

JETTY SIMON
v.
JOHN N. CRAFT.

Appeal from Mobile circuit court.

Come the parties, by attorneys, and submit this cause on briefs for decision.

Supreme Court of Alabama, November 23rd, 1899, 1 Div., 19.

JETTY SIMON
v.
JOHN N. CRAFT.

Appeal from Mobile circuit court.

Come the parties, by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the circuit court there is no error. It is therefore considered that the judgment of the circuit court be in all things affirmed. It is also considered that the appellant and S. Haas & Walter Mitchell, sureties on the appeal bond, pay the costs of appeal of this court and of the circuit court.

55 *Agreement.*

In the Supreme Court of Alabama, 1 Division, 19.

JETTA SIMON, Appellant,
v.
JOHN N. CRAFT, Appellee.

It is hereby agreed by and between the attorneys of record in the above-entitled cause that on January 9th, 1896, John N. Craft, the present appellee, filed in the circuit court of Mobile county the following appearance and plea, viz:

"*Appearance.*

STATE OF ALABAMA, }
Mobile County. }

Circuit Court, Fall Term, 1895.

JETTA SIMON
vs.
CHARLES H. BROWN; JOHN N. CRAFT, Landlord, Substituted on His Motion.

MOBILE, *Jan'y 9th*, 1896.

We appear for John N. Craft, defendant, substituted on his own motion for Charles H. Brown, his tenant, and pleads in short, by consent, not guilty, and suggests and shows as a suggestion on the record that said defendant, Craft, hath held and does hold possession of the premises sued for under color of title in good faith.

PILLANS, TORREY & HANAW,
OVERALL, BESTOR & GRAY,
Att'y- for Defendant.

Filing.

Filed in office Jan'y 9, 1896.

B. F. JACKSON, *Clerk.*"

It is further agreed by and between the attorneys of record in the above-entitled cause that the transcript in the matter of the present appeal, in which Jetta Simon is the appellant and John N. Craft is the appellee, shall be read as if the said appearance and plea were inserted therein on page 2, just above the word "judgment," where the same appears on the margin of said transcript, and that said transcript shall be taken and considered in all respects as if the said appearance and plea had been originally written therein and formed part thereof, and that as thus amended and read the said transcript contains a full, true, and perfect transcript of the record and proceedings had in the said circuit court of Mobile county in a certain cause therein lately pending, wherein Jetta Simon was plaintiff and John N. Craft defendant, he having been substituted as landlord upon his own motion as the de-
56 fendant in the place and stead of Charles H. Brown, the original defendant, and that the record of which said transcript is a copy now remains in the office of the clerk of the circuit court of Mobile county.

GREGORY L. & H. T. SMITH,
Attorneys for Appellant.
PILLANS, TORREY & HANAW,
BESTOR & GRAY,
Att'ys for Appellee.

57 THE STATE OF ALABAMA,
Judicial Department.

The Supreme Court of Alabama, Special Term, October, 1898, 1 Div., 910.

JOHN N. CRAFT
v.
JETTA SIMON.

Appeal from Mobile circuit court.

COLEMAN, *J.:*

Jetta Simon, the appellee, sued in ejectment to recover a certain lot of land. The facts were substantially agreed upon, and upon the evidence the court instructed the jury to find for the plaintiff. The conclusion of the court from the evidence is questioned by the assignments of error. The land sued for at one time belonged to the plaintiff, and the issue involved was whether the defendant had acquired her title.

Upon proceedings instituted in the probate court of Mobile county, Jetta Simon had been declared to be of unsound mind, and one Ralph G. Richard was appointed her guardian. It was upon his petition as guardian that the land was sold under and by virtue of a decree of the probate court. The defendant Craft became the purchaser, paid the purchase-money, the sale was confirmed, and a deed duly executed to him. The regularity of the petition for the sale of the land, the proof in support of it, the confirmation and the execution of the deed to the purchaser are not questioned. The real question is whether Jetta Simon was legally declared to
58 be of unsound mind. This being established, the remainder of the proceedings, including the acquisition of title by the defendant, cannot be assailed. The sufficiency of the petition to institute an inquiry into the soundness of mind of Jetta Simon was not questioned in the court below, nor has it been questioned in the argument of counsel on this appeal.

It is contended that the authority of the court to appoint a guardian being dependent upon the fact that Jetta Simon was legally declared to be of unsound mind, unless the record furnishes the evidence for the exercise of the authority, the appointment itself must fall, and if there was no legally appointed guardian, then there could be no valid sale upon his petition. Eslona *v.* Lepretre, 21 Ala., 504; Moody *v.* Bibb, 50 Ala., 245; Walton *v.* Henderson, 62 Ala., 426. This is the argument of appellee. Conceding the proposition to be sound, the question for consideration, as we have stated it, is whether Jetta Simon was legally and properly found and declared to be of unsound mind so as to authorize the appointment of a guardian.

It is said that the court had no jurisdiction to make the appointment: First, because no jury constituted as required by law to make inquisition of lunacy was ever drawn, summoned, or empanneled; second, because no opportunity was afforded to appellee to be heard at the inquisition; third, because no verdict was rendered, in the

proceedings to declare her a lunatic, ascertaining the jurisdictional facts or justifying the appointment of a guardian.

Section 787 of the Code is as follows: "Jurdisiction of courts of probate.—Courts of probate have, in the cases defined by law, original jurisdiction of—

"Subdiv. 6. The appointment and removal of guardians for minors and persons of unsound mind."

The fact that the constitution granted the General Assembly power to establish courts of probate, with general jurisdiction for the grant of letters testamentary, etc., furnishes no argument that the General Assembly is denied the power to invest probate courts with original jurisdiction in the matter of persons of unsound mind. State *ex rel.*, etc., *v.* Sayre, in MS.

The jurisdiction to appoint guardians for persons of unsound mind is as extensive as in the case of probate of wills, the
59 granting of letters testamentary, sales of property of intestates, allotment of dower, and partition of lands, all of which are enumerated, with other subject-matters of jurisdiction, under said section 787. Said section 787 and sections 2390, 2391, 2392 declare that the probate court has authority, and it is the duty of the court, to appoint guardians for persons of unsound mind, and although the statute provides that a guardian shall not be appointed "until an inquisition has been had and taken as hereinafter directed," the proceedings are, nevertheless, before the probate court as a court, and the issues are determinable in that court. The jurisdiction attaches, both as to the subject-matter and the person, upon the filing of a proper petition and the issuance and service of notice upon the party to be affected in the manner prescribed by the statute. The petition is in strict accordance with section 2392, Code of 1886, which prescribes the allegations that the petition shall contain in the inquisition proceedings.

As to the first ground of objection, that no jury was summoned as provided by law, section 2393 of the Code provides that the jury must consist of "twelve disinterested persons of the neighborhood" of the alleged unsound person. If there was a special statutory tribunal, of which the jury constituted a part, to determine the issues, as we understand counsel for appellee to insist, there would be some force in the argument; but if the issue is to be tried before the probate court, as we have determined, then the statute of 1892–'3, pp. 501, 509, must control. This statute provides how the jury shall be drawn whenever an issue is to be tried by a jury in the probate court of Mobile county. The jury seems to have been drawn in accordance with the statute. We are of opinion the objection is not well taken.

The second ground of objection is that the appellee had no opportunity to be heard at the inquisition. This objection is based upon the character and wording of the writ directed to the sheriff. The provision of the statute is that the judge must "issue a writ, directed to the sheriff, to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial." The writ that issued, after setting out the facts

averred in the petition, proceeded: "Now, therefore, if it be
60 consistent with the health and safety of said Jetta Simon, you are hereby required to take her body so that you may have her in said court, etc." The statute is that the sheriff be directed to take her body, and if consistent with health, etc. By the statute it is made the duty of the sheriff to take the body without condition, and, if consistent with health and safety, to — her present at the trial. The writ issued, directed to the sheriff, "if consistent with health and safety, to take her body, etc." The return of the sheriff shows that the writ was executed in accordance with the statute. It is: "I executed the within writ of arrest by taking into my custody the within-named Jetta Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety * * * to have her at the place of trial * * * she is not brought before the court." Technically the writ of the judge was not accurately correct. Its meaning, however, is evident. The sheriff's return was complete and regular in every respect. We do not doubt she was brought into court in the manner prescribed by statute, and that she was subject to its jurisdiction. The second objection cannot be sustained.

The third objection finds some support in the phraseology of the statutes and has been forcibly and ingeniously presented. After a careful consideration of the statutes enacted from 1866 to the adoption of the provisions of the Code of 1886, defining and regulating inquisitions of lunacy and appointment of guardians for persons of unsound mind, we are led to the conclusion that the purpose and intention of the legislature by the adoption of the Code statutes was to declare the whole law upon the subject, and thereby repeal all former statutes in relation thereto. Applying the same rules of construction to the statutes which confer jurisdiction upon the probate courts in the matter of the appointment of guardians for persons of unsound mind as are applied to like statutes, which confer jurisdiction in matters of partition of lands, etc., we hold that upon the filing of a proper petition and the service of summons and notice in the manner prescribed the jurisdiction of the court attaches and its conclusions are not void on collateral attack. Jurisdiction having attached, the failure of the decree to ascertain that the jurisdictional facts had been proven would not affect the validity of the
61 decree. Pollard *v.* Mortgage Co., 103 Ala., 289, and authorities cited. Errors and irregularities must be corrected by direct appeal or writ of certiorari. Any other view would greatly embarrass guardians appointed by the court in such cases and deter purchasers at sales, though ordered by the court, and would not be reconcilable with well-settled principles applying in cases in which there does not seem to be any valid reasons for a distinction. Fore *v.* Fore, 44 Ala., 478; Campbell *v.* Campbell, 39 Ala., 312; Pollard *v.* Am. F. L. M. Co., 103 Ala., 289; Kling *v.* Connell, 17 So. Rep., 121; Landford *v.* Dunklin, 71 Ala., 603.

The jury be their verdict found "Mrs. Jetta Simon to be of unsound mind." The statute requires the court to appoint guardians for persons of "unsound mind." The finding of the jury was suffi-

cient, at least on collateral attack, to authorize the appointment. The court erred in giving the affirmative charge requested by the plaintiff.

There was no provision in the statute which conferred jurisdiction upon chancellors to remove the disabilities of coverture prescribing the constituents of a petition for such relief. Had there been, the sufficiency of a petition which complied with such requirements would not have been questioned. The petition in the present case strictly complied with the statute, Code, section 2392, *supra*. Moreover, the statute conferring jurisdiction upon the probate court to make inquisition in such cases is broader in terms than the statute which conferred jurisdiction upon chancellors to grant relief from the disabilities of coverture.

Reversed and remanded.

62 THE STATE OF ALABAMA, *Judicial Department.*

The Supreme Court of Alabama, November Term, 1896, 1 Div.

JOHN N. CRAFT *v.* JETTA SIMON.

Appeal from Mobile circuit court.

HEAD, *J.*, dissenting:

The question in this case is whether or not the probate court had jurisdiction to appoint Ralph G. Richards guardian of the person and estate of Jetta Simon, alleged to have been a person of unsound mind.

It is not disputable that the jurisdiction of that court of the appointment of guardians of persons of unsound mind, being statutory, is special and limited, and that every fact made by the statute a prerequisite to the exercise of the jurisdiction must appear affirmatively upon the face of the court's proceedings in order to uphold the validity of the appointment.

The statute by which the validity of the appointment now in question is to be tested is contained in the article and chapter of the Code of 1886, beginning with section 2390. That section (2390) provides that "the court of probate has authority and it is a duty to appoint guardians for persons of unsound mind residing in the county having an estate, real or personal, and of persons of unsound mind residing without the State having within the
63 county property requiring the care of a guardian under the limitations and in the mode hereinafter prescribed."

Thus we see the requisites defined by this section to be established in the mode prescribed by subsequent provisions of the article are: 1, that the person is of unsound mind; 2, that he or she resides in the county where the proceeding is had, and, 3, that he or she has an estate, real or personal; or, 1, that the person is of unsound

mind; 2, that he or she resides without the State, and, 3, that he or she has property in the county requiring the care of a guardian.

Section 2392 provides that "upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the court of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof."

Thus we see that the facts required by sections 2390, as above stated, are required to be set out in the petition, and in addition thereto the petition must show that it is filed by a relative or friend of the person alleged to be of unsound mind, and must set forth the name, sex, and age of such person. These are the jurisdictional facts required to be set forth as the basis of the inquisition and ascertainment by the verdict of a jury, whether or not they are true. Thus section 2394 requires that a "jury must be impaneled and sworn well and truly to make inquisition of the facts alleged in the petition, and a true verdict render according to the evidence;" and section 2395 provides that "if the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition and all the proceedings thereon to be recorded, and appoint a suitable guardian;" and section 2391 declares that a guardian for a person alleged to be of unsound mind residing in the county must not be appointed until an inquisition has been had and taken as directed in the article.

Were these proceedings conformed to in the case of Jetta Simon, so as to confer jurisdiction upon the probate court to appoint
64 Richards her guardian?

We will look first at the petition and see if it shows the jurisdictional facts which the statute requires it to show. It shows that it was filed by said Richards, and that he was a friend of said Jetta and her family. It states the age and sex of said Jetta; her residence in Mobile county, where the proceeding was had, and that she is of unsound mind and incapable of managing her affairs. This is all, save the prayer. It therefore omits one of the most vital jurisdictional facts. Upon reading section 2390 it is seen that the jurisdiction is not conferred to appoint guardians for persons of unsound mind generally, but for such persons, if residing in the county, having an estate, real or personal; or, if residing without the State, having within the county property requiring the care of a guardian. It nowhere appears in the proceedings that Jetta Simon had an estate, real or personal, anywhere.

The case is stronger against the validity of the proceeding than that of Cohen *v.* Woolner, 72 Ala., 233. There the statute was, "That the several chancellors in this State, either in term time or vacation, are hereby authorized and empowered to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy,

sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*, whenever the wife by her next friend, shall file her petition in the court of chancery for the district in which she resides, praying that she be decreed, for the purposes aforesaid, to be declared a *femme sole*." The petition of the wife, under this statute then before the court, did not state that she had a statutory or other separate estate. The decree upon that petition removing her disabilities was being collaterally assailed. The court held that the petition was fatally defective on account of the omission stated; that the chancellor was consequently without jurisdiction and his decree void. Chief Justice Stone said, "What are the essentials to put this statutory jurisdiction into exercise? The petitioner must be a married woman. The statute provides for none other. She must have an estate, for the powers of the chancellor can be invoked and exercised only in reference to her estate. The estate must be separate, either statutory or otherwise. Such is the statute, and the chancellor's power is confined by the statute to that description of estate. We say she must have an estate. Courts pronounce on existing rights and existing conditions, not on future possibilities. A petition under this statute, averring that the petitioner had no estate, statutory or otherwise, would certainly be demurrable. The chancellor would not pronounce judgment on a mere abstraction or imaginary case. A real subject of judicial inquiry must be before the court. A proceeding to obtain the judgment of the court as to a right of property when there is no such property in existence is certainly an anomaly. The statute requires that such petition shall pray that the petitioner 'be decreed for the purposes aforesaid a *femme sole*.' The purposes aforesaid are relief from 'the disabilities of coverture as to her statutory and other separate estate.' How can she be under disabilities when she has no estate? And how can the chancellor confer on her power over that she has not and never may acquire? The petition found in these records, under which it is claimed Mrs. Cohen was relieved by the disabilities of coverture, is fatally defective in substance, and did not put this statutory power of the chancellor into exercise. It entirely omits to aver that she had any estate of any kind, statutory or otherwise, and thus fails to show she was entitled to the relief the statute offers. A failure to make a jurisdictional averment in statutory proceedings like this is equivalent to an admission that there is no fact on which to base such averment. The chancellor never having acquired jurisdiction, the whole proceeding was and is void." Citing a number of Alabama cases. This case has been followed in the following: Stoutz *v.* Burke, 74 Ala., 530; Voltz *v.* Voltz, 75 Ala., 555; Falk *v.* Hecht, *ib.*, 293; Hatcher *v.* Diggs, 76 Ala., 189; Powell *v.* Mortgage Co., 87 Ala., 602. In Cox *v.* Johnson, 80 Ala., 24, the same principle was applied to the statute for relieving minors of their disabilities. In these cases, in reference to the disabilities of married women, we have seen the statute did not in terms provide what the petition should contain. Here it expressly requires that it shall contain these facts.

The principle above declared, that the statutory jurisdictional facts must affirmatively appear of record when the jurisdiction is statutory and limited, as in this case, is as old to this court as the organization of the court itself, and has been declared and enforced in decisions numbered by scores. There is no more firmly established rule of property in this State.

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The probate court, by reason of the omission mentioned, was, unless the rule be set at naught, without jurisdiction to appoint a guardian, and the appointment of Richards was void.

But if this were otherwise, if the petition had alleged all these requisite facts, we find there is wanting the judicial ascertainment of the truth and existence of such facts which the statute in terms provides shall be had before the appointment of a guardian shall be made. A requirement of a petition stating certain named facts would be the emptiest form, without some adequate procedure for the ascertainment of their truth, and until there truth is judicially ascertained and established in the mode prescribed by law, the case they make cannot, in the view of a court of justice, be said to exist. We search the record of the proceedings in vain to find thereon an ascertainment, judicial or otherwise, by judge or jury, that either of the jurisdictional facts to which I have referred ever had an existence, except that Jetta Simon was a person of unsound mind. Although the jurisdiction is confined to persons of unsound mind who have estates, real or personal, and who, unless non-residents of the State, reside in the county where the proceedings are instituted, there was no ascertainment whatever that Jetta Simon resided in Mobile county, or that she had any estate whatever, real or personal. So far as these proceedings ascertain (or even allege, as for that matter), the appointment of Richards was a mere effort to commit to him the care and keeping of the person of Jetta Simon, a person residing we know not where and owning no estate—a case for which the law makes no provision whatever. The statute expressly provides how the facts shall be judicially ascertained, in terms requiring that a jury shall "make inquisition of the facts alleged in the petition and a true verdict render according to the evidence," and then declares that "if the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition and all the proceedings thereon to be recorded and appoint a suitable guardian of such person." It thus becomes, first, by the allegation of the essential facts in the petition, and next by the judicial ascertainment by a jury that the facts so alleged are true, a case where the probate court is authorized to appoint a guardian. This ascertainment by a jury is manifestly a *sine qua non* to the exercise of the jurisdiction. Language could not be plainer. The verdict simply was that Jetta Simon was a person of unsound mind, thus failing to ascertain any of the other jurisdictional facts. The effect of the majority opinion is that the very, the only, means provided and required by the statute for the judicial ascertainment and establisment of facts which constitute the case in which, by the statute, the probate court is authorized to appoint a guardian is a mere

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matter of regulation and its non-observance a mere irregularity. If this be true, then most clearly no verdict at all need be rendered in order to uphold the appointment, for if a verdict may omit to find all the facts but one and still be sufficient, a finding of none of the facts is essential, and if this be true the requirement of an inquisition and the mode of conducting it prescribed by the statute would be likewise matters of regulation, and their non-observance would not affect the validity of the appointment, for surely the verdict required by the statute to be rendered is the sole end and aim of the inquisition, without which the inquisition would amount to nothing, and this verdict, to be of any force at all, must be the verdict which the statute requires—it must ascertain that the facts stated in the petition are true. The result would be that the probate court would be authorized to appoint the guardian upon bare allegations of facts unproven, unascertained, by any judicial proceeding, and the order of the probate court appointing the guardian would be conclusive evidence of its authority to make the appointment. If this be a correct construction of the statute I would hesitate to say that it is not violative of both the Federal and State constitutions, in that by virtue of it a person may be deprived of the possession of his property without due process of law.

It is said in the opinion of the court that "the jurisdiction to appoint guardians for persons of unsound minds is as extensive as in the case of probate of wills, the granting of letters testamentary, sales of property of intestates, allotment of dower, and partition of lands, all of which are enumerated, with other subject-matters of jurisdiction, under said section 787" of the code. As I under-
68 stand the rule, this statement is partially incorrect. As to sales of property of intestates, allotment of dower, and partition of lands, it is correct; but as to probate of wills, the granting of letters testamentary and of administration, and of orphans' business, the jurisdiction is derived from the constitution and is therefore general, and, like all other courts of general jurisdiction, its decrees in those matters are valid, unless by something appearing upon the record it is affirmatively shown that some jurisdictional fact did not exist in the particular case, whereas in those proceedings wherein the jurisdiction of the court is of purely legislative creation, such as sales of property of intestates, dower proceedings, partition, and the like, the jurisdiction is special and limited, and no intendments will be indulged to support its exercise. The facts which the statute makes essential to the jurisdiction must affirmatively appear upon the record, or else the decree will be void.

For the authorities making this distinction plain, see the collation in 3 Brick. Dig., p. 181, §§ 71, 72. Take the case of Sims *v.* Waters, there cited, and from it we see that in the settlement of intestates' estates before the probate court, prior to the grant to that court of general jurisdiction of such settlements by the constitution of 1868, the jurisdiction was special and lim-ted, whereas after the constitutional grant it was general.

The statute, § 787 of the Code, does not undertake or profess to constitute the probate court a court of general jurisdiction of any

matter. Original jurisdiction of the specified subjects-matter is conferred, but, like all purely statutory jurisdictions, those not given by the constitution must not only be exercised substantially as the statute requires, but the essential facts—those which make up the jurisdiction—must affirmatively appear.

The summation of the decision of the court is that the probate court may appoint a guardian of a person of unsound mind without an allegation, even, that the person is of that class of persons *non compos mentis*, over whom the statute extends the jurisdiction, to wit, those having an estate, real or personal, much less proof or judicial ascertainment that the person is of that class. There is not, from the beginning to the end of the proceedings in the matter of the appointment of Richards, an intimation that Jetta
69 Simon was a person of unsound mind having an estate, real or personal. Nor is it necessary that the further jurisdictional facts be judicially established by the inquisition and verdict which the statute requires, unless the court would hold that it is necessary that there should be a verdict finding that the person was a "person of unsound mind," as there was in the case of Jetta Simon, and which is now held to have been sufficient without more.

In the view I take of the decision, it is a departure from so many adjudications of this court holding that in statutory proceedings of this kind, before courts of special and limited jurisdiction, the jurisdictional facts must appear of record, that I feel it my duty to file my dissent.

70 STATE OF ALABAMA, }
Judicial Department. }

The Supreme Court of Alabama, Division Number 19.

JETTY SIMON, Plaintiff in Error, }
vs. }
JOHN N. CRAFT, Defendant in Error. }

I, Robert F. Ligon, Junior, clerk of the supreme court of Alabama, by virtue of the writ of error, which is hereto attached, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 60, inclusive, supplemented by pages marked A, B, C, and D, inclusive, contain a complete, true, and correct copy of the record of the appeal in said cause in the supreme court of Alabama, together with the assignments of errors made in said court, and of the record and all of the proceedings had in the supreme court of Alabama in said cause, as the same appear and remain of record in this office.

And I further certify that said foregoing pages contain also true and complete copies of all of the opinions rendered by the supreme court of Alabama in said cause, both upon the last and upon the former appeals therein.

In witness whereof I have hereunto affixed the seal of Alabama,

at the capitol of the State of Alabama, at Montgomery, on this the 15th day of January, A. D. 1900.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of Alabama.

71 To the Honorable Thomas N. McClellan, chief justice of the supreme court of Alabama:

And now comes your petitioner, Jetty Simon, and humbly petitioning your honor for a writ of error to bring before the Supreme Court of the United States the record and proceedings of the supreme court of Alabama in a certain cause hereinafter designated for the correction of errors therein, shows unto your honor:

First. That on the 23rd day of November, 1899, the supreme court of Alabama, being the State court of last resort in Alabama to which said matter can be presented or a decision therein had, rendered a final judgment in a certain cause then pending, wherein your petitioner, Jetty Simon, was the appellant and John N. Craft was the appellee, thereby in all things affirming a final judgment which had been rendered by the circuit court of Mobile county, Alabama, on the thirteenth day of December, 1898, in an action of ejectment, wherein your petitioner, Jetty Simon, was the plaintiff and the said John N. Craft, having been substituted for his tenant, was the defendant, which said judgment was in favor of the defendant, John N. Craft, and against the plaintiff, who is now your petitioner.

Second. And your petitioner further shows unto your honor that in said judgment of affirmance the supreme court of Alabama committed an error in that your petitioner was thereby deprived of her property without due process of law and in direct violation of section one, article fourteen, of the Constitution of the United States. Said constitutional question arose and was directly presented to and passed upon by the supreme court of Alabama adversely to your petitioner, claiming immunity under said section one, article fourteen, of the Constitution of the United States, and your petitioner was deprived of her property without due process of law in the following manner—that is to say, that your petitioner instituted an action of ejectment in the circuit court of Mobile county, Alabama, on the 6th day of September, 1895, against one Charles L. Brown to recover the possession of certain real
72 estate situate in Mobile, Alabama, and the said John N. Craft, being the landlord of the said Brown, was substituted for him and became defendant in said action. Upon the trial of said action the title of the plaintiff was admitted, but the defendant claimed to have obtained the title of the plaintiff by virtue of a sale and mesne conveyances from one Ralph G. Richards, purporting to act as the guardian of the plaintiff and to make said sale and execute said conveyance, by the authority of the probate court of Mobile county had in a certain proceedings which were begun by a petition filed by said Ralph G. Richards, styling himself as

the guardian of the plaintiff, and praying for authority from the probate court of Mobile county to sell said property for the payment of certain debts alleged to be due by your petitioner. To this proceedings your petitioner was not a party, and of them she had no notice. In order to bind your petitioner by the said sale and by the conveyance of said Ralph G. Richards the defendant undertook to show that your petitioner had been adjudged a lunatic, and that the said Ralph G. Richards had been regularly appointed as her guardian, and to this end introduced in evidence the record of certain proceedings had in the probate court of Mobile county, Alabama, which were begun on the 31st day of January, 1889, by a petition of the said Ralph G. Richards, in which he alleged, amongst other things, that your petitioner was of unsound mind and incapable of governing herself or conducting and managing her affairs, and praying that such proceedings might be had as were necessary and proper to determine, according to law in such cases made, whether or not your petitioner was a person of unsound mind; but your petitioner shows unto your honor that the said entire proceedings were void, first, because the said probate court had no jurisdiction of the subject-matter thereof, and second, because said proceedings were had against your petitioner without due process of law, in this, that the sheriff of Mobile county took the body of your petitioner into his custody, and actually and physically restrained her from appearing at the trial of said matter and from defending her liberty and property against the inquisition of lunacy which had been thus instituted,
73 which said restraint was imposed upon your petitioner by the said sheriff in conformity to the writ which was issued in said matter from the said probate court. Your petitioner shows unto your honor that the statute of Alabama, under which said proceedings was had, provides for no process whatsoever to the person against whom an inquisition of lunacy is instituted, except that the judge of the probate court "must also issue a writ, directed to the sheriff, to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial." In attempted compliance with this statute, the probate court of Mobile county, upon the filing of said petition by said Richards, issued a writ to the sheriff of Mobile county, directing him thus: "Now, therefore, if it be consistent with the health and safety of the said Jetty Simon, you are required to take her body, so that you may have her in said court to be present at said trial and before the jury then to be empanneled to make said inquisition." Your petitioner shows unto your honor that the provisions of said statute leave it to the sheriff of the county to determine, in his discretion, whether the alleged lunatic shall or shall not be accorded the privilege guaranteed by the Constitution of the United States, of having an opportunity of introducing evidence and to be heard before they are deprived of their liberty and property; that the said writ so issued in this instance submitted it to the sheriff to determine, in his discretion, whether your petitioner should be permitted to be present at the trial of said petition

or to controvert its allegations or to be heard upon the subject, and the sheriff of Mobile county in this particular instance, as appears from his return, exercised his discretion against your petitioner, took her body into his custody, and restrained her from being present and defending said matter, so that your petitioner was deprived of all opportunity of being heard upon said matter. Meantime, the said probate court, while thus causing your petitioner to be restrained, as aforesaid, proceeded *ex parte* and in her absence to declare her a lunatic and to appoint the said Ralph G. Richards as a guardian of her entire estate, and your petitioner shows
74 unto your honor, therefore, that the said appointment of Ralph G. Richards as her guardian was absolutely void and that she was not, therefore, bound by the proceedings which the said Ralph G. Richards subsequently instituted for the sale of her property and of which she had no notice, and that the defendant, John N. Craft, obtained no title to your petitioner's property by virtue of the deed which was executed by the said Ralph G. Richards and the mesne conveyances.

And your petitioner further shows unto your honor that for a number of other reasons, which will fully appear in an examination of the transcript of the record and proceedings of the supreme court of Alabama in said cause, which is herewith presented, the said probate court had no jurisdiction whatsoever of said subject-matter, and that for those reasons also the said appointment of Ralph G. Richards was a mere nullity.

Your petitioner, however, shows unto your honor that at the trial of said ejectment suit so instituted, as aforesaid, by your petitioner in the circuit court of Mobile county the said circuit court held that the probate court of Mobile county did obtain jurisdiction of the subject-matter of said inquisition of lunacy by virtue of the filing of the petition by Ralph G. Richards alleging that your petitioner was insane and seeking to have her declared a lunatic, and that your petitioner was bound by said proceedings, notwithstanding the fact that, in accordance with the only process which was issued therein to your petitioner, she was by the sheriff of Mobile county taken into his custody and physically restrained from appearing at the hearing or defending said matter, and instructed the jury that if they believed the evidence they should find for the defendant, which the jury accordingly did; whereupon the said circuit court of Mobile county rendered a judgment in favor of the defendant and against your petitioner for the lands in *ug*estion. From this judgment your petitioner sought and obtained an appeal to the supreme court of Alabama, and the supreme court of Alabama on the 23rd day of November, 1899, rendered the judgment aforesaid affirming the judgment of the court below, thus necessarily passing upon the validity of the appointment of said guardian, and holding that your petitioner was deprived of her title to her said real estate by
75 virtue of the said appointment of said guardian and if his *ex parte* proceedings for the sale of her said property, thus depriving your petitioner of her property without affording her the

opportunity of being heard either at the said inquisition of lunacy or at the said proceedings for the sale of the said real estate.

In evidence of all of which your petitioner presents herewith a full and complete transcript of the record and proceedings had in said cause in the supreme court of Alabama, duly certified.

Your petitioner also presents herewith her assignment of errors.

Wherefore your petitioner prays unto your honor that a writ of error may issue in this behalf from the Supreme Court of the United States to the supreme court of Alabama for the correction of the error so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States for such further proceedings as may be there had, and that your petitioner may have such other or further relief as she may be entitled to, the premises considered.

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Plaintiff in Error.

Presented to me this the 15th day of January, 1900.
THOS. N. M'CLELLAN,
Chief Justice.

76 JETTY SIMON, Plaintiff in Error,
vs.
JOHN N. CRAFT, Defendant in Error.

"*Assignments of Error Committed by the Supreme Court of Alabama.*"

And now comes the plaintiff in error, by her attorneys, and says that in the record and proceedings in the supreme court of Alabama in the above-entitled cause there is manifest error in this:

The action was in ejectment.

The title of the plaintiff was admitted, but the defendant in error claimed to have obtained the title of the plaintiff by virtue of a sale and mesne conveyance from one Ralph G. Richards, purporting to act as the guardian of the plaintiff, and to make said sale and execute said conveyance by virtue of the authority of the probate court of Mobile county, had in a proceedings which was begun by a petition filed by said Ralph G. Richards, styling himself as the guardian of the plaintiff, and praying for authority from the probate court of Mobile county to sell said property for the payment of certain debts alleged to be due by the plaintiff. To this proceedings plaintiff was not a party and of it she had no notice. In order to bind the plaintiff by the said sale and conveyance the defendant undertook to show that the plaintiff had been adjudged a lunatic, and the said Richards had been regularly appointed as her guardian, and to this end introduced in evidence, against the objection of the plaintiff, the record of certain proceedings had in the probate court of Mobile county, which were begun on the 31st day of January, 1889, by a petition of said Richards, alleging, amongst other things, that

the plaintiff was of unsound mind, and praying that such proceedings might be had as were necessary and proper to determine, according to law in such cases made, whether or not the plaintiff was a person of unsound mind. Such proceedings were void, first, because said probate court had no jurisdiction of the subject-matter thereof,
77 and, second, because said proceedings were had against the plaintiff without due process of law in this, that the sheriff of Mobile county took the body of the plaintiff into his custody and actually and physically restrained her from appearing at the trial of said matter and from defending her liberty and property against the inquisition of lunacy which had been thus instituted, which said restraint was imposed upon the plaintiff by the said sheriff in conformity to the writ which was issued in said matter by the probate court. The statute of Alabama under which said proceedings was had provides for no process whatever to the person against whom an inquisition of lunacy is instituted, except that the judge of the probate court "must also issue a writ direct to the sheriff to take the person alleged to be of unsound mind and, if consistent with his health and safety, have *them* present at the place of trial." In attempted compliance with this statute the probate court of Mobile county, upon the filing of said petition by said Richards, issued a writ to the sheriff of Mobile county, directing him thus: "Now, therefore, if it be consistent with the health and safety of the said Jetty Simon, you are required to take her body, so that you may have her in said court to be present at said trial and before the jury then to be empanelled to make said inquisition." Upon the issuance of said writ the said sheriff of Mobile county, as appears from his return, took the body of the plaintiff into his custody and restrained her from being present and defending said matter, so that she was deprived of all opportunity of being heard upon said matter. Meanwhile the said probate court, while thus causing the plaintiff to be restrained, as aforesaid, proceeded in her absence to declare her a lunatic and to appoint the said Ralph G. Richards as the guardian of her entire estate. Said proceedings were, therefore, void. The defendant was, nevertheless, permitted by the trial court, against the objection of the plaintiff, to introduce in evidence said entire proceedings, and the said trial court thereupon charged the jury in writing that if the jury believed all of the evidence in the case they ought to find a verdict for the defendant, and refused the written request of the plaintiff to charge the jury as follows:
78 "If the jury believe all of the evidence in the case they ought to find a verdict for the plaintiff for the lands described in the complaint." The verdict was for the defendant, and from the judgment rendered thereon an appeal was taken to the supreme court of Alabama, where a decision was rendered to the effect that the proceedings declaring the plaintiff in error a lunatic and appointing the said Richards as her guardian were valid and binding, and that by virtue thereof and of the conveyance of the said Ralph G. Richards the plaintiff was deprived of her title to the property in question. From this judgment this writ of error has been allowed, and the plaintiff in error insists:

1st. That the supreme court of Alabama erred in deciding that the said record and proceedings of the probate court of Mobile county, Alabama, in the matter of the inquisition of lunacy against the plaintiff in error were admissable in evidence against her.

2nd. That the supreme court of Alabama erred in deciding that the said proceedings in the probate court of Mobile county, by which the plaintiff in error was declared a lunatic, could not be collaterally impeached.

3rd. That the supreme court of Alabama erred in holding that the said proceedings in the probate court of Mobile county, by which the plaintiff in error was declared a lunatic, were supported by the service of due process of law as against the plaintiff in error.

4th. That the supreme court of Alabama erred in deciding that the decree of the probate court of Mobile county appointing Ralph G. Richards as the guardian of the plaintiff in error was valid and binding as against the plaintiff in error.

5th. That the supreme court of Alabama erred in deciding that the probate court of Mobile county had jurisdiction to appoint Ralph G. Richards as the guardian of the plaintiff in error.

6th. That the supreme court of Alabama erred in deciding that the said record and proceedings of the probate court of Mobile county in the matter of the petition of Ralph G. Richards for the sale of the real estate which is the subject-matter of this suit *was* admissable evidence against the plaintiff in error.

7th. That the supreme court of Alabama erred in deciding
79 that the deed which was executed by Ralph G. Richards on the 11th day of May, 1899, to Henry J. Simon operated to divest the title of the propery in question out of the plaintiff in error.

8th. That the supreme court of Alabama erred in holding that the proceedings had in the probate court of Mobile county for the sale of the real estate in question and the decree authorizing said sale under which Ralph G. Richards conveyed the property in question to Henry J. Simon *was* not void for want of due process of law as against the plaintiff in error.

9th. That the supreme court of Alabama erred in holding that the circuit court of Mobile county did not err in charging the jury as follows: "If the jury believe all of the evidence in the case, they ought to find a verdict for the defendant."

10th. That the supreme court of Alabama erred in holding that the circuit court of Mobile county did not err in refusing the written request of the plaintiff in error to charge the jury: "If the jury believe all of the evidence in the case, they ought to find a verdict for the plaintiff for the lands described in the complaint."

11th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error first objection "to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law."

12th. That the supreme court of Alabama erred in deciding that

the circuit court of Mobile county did not err in overruling the plaintiff's in error second objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that there was no process issued notifying Jetty Simon to be present at the trial of the inquest of lunacy that was held."

13th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error third objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error
80 a lunatic because said proceedings did not constitute due process of law, "in that no provision was made in or by said proceedings whereby said Jetty Simon might be present at the inquest of lunacy that was held."

14th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error fourth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not."

15th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error fifth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy."

16th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error sixth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprived her of the opportunity to be heard at the inquest of lunacy."

17th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error seventh objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy."

18th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling
81 the plaintiff's in error eighth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not consti

tute due process of law, "because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with article 5 — the amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law, and in conflict with article XIV of the amendment to said Constitution:

a. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

b. In that it authorizes a citizen to be deprived of his or her property without due process of law.

19th. That the supreme court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error ninth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic, "because said proceedings in the probate court are irrelevant and immaterial to any issue in the cause."

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Plaintiff in Error.

Presented to me this January 15, 1900.

THOS. N. McCLELLAN,
Chief Justice.

82 JETTY SIMON, Plaintiff in Error,
vs.
JOHN N. CRAFT, Defendant in Error.

Know all men by these presents that we, Jetty Simon and Alex. Bloch and S. Hass, are held and firmly bound unto the above-named John N. Craft in the full sum of two hundred and fifty dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

In witness whereof we have hereunto set our hands and seals this the 20th day of December, 1899.

The conditions of the foregoing obligation are such that whereas the above-named Jetty Simon has prayed for and obtained the issuance of a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of Alabama on the 23rd day of November, 1899:

Now, therefore, if the above-named Jetty Simon prosecute said writ of error to effect and pay and answer all such costs and damages as may be awarded against her in the Supreme Court of the United States should she fail to make good said appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JETTY SIMON. [SEAL.]
ALEX. BLOCH. [SEAL.]
S. HAAS. [SEAL.]

STATE OF ALABAMA, }
County of Mobile. }

83 Personally appeared before me, Fannie Frolichstein, a notary public in and for said State and county, Alex. Bloch and S. Haas, each of whom, being duly sworn, deposes and says that he is worth more than the sum of two hundred and fifty dollars over and above all of his just debts, liabilities, and exemptions in property and subject to execution.

ALEX. BLOCH.
S. HAAS.

Subscribed and sworn to before me this the 20th day of December, 1899.

[Seal Fannie Frolichstein, Notary Public, Mobile Co., Ala.]

FANNIE FROLICHSTEIN,
Notary Public, Mobile Co.

This bond is approved by me this the 20 day of Dec., 1899.

THOS. N. McCLELLAN,
Chief Justice Supreme Court of Alabama.

At the instance of counsel for plaintiff in error I now again approve the above bond this January 15th, 1900.

THOS. N. McCLELLAN,
Chief Justice, etc.

84 JETTY SIMON, Plaintiff in Error, }
vs.
JOHN N. CRAFT, Defendant in Error. }

And now comes Jetty Simon, the plaintiff in error in the above-entitled cause, and prays the Supreme Court of the United States to reverse the decision of the supreme court of Alabama in the above-entitled cause on account of the errors specifically pointed out in the assignments of errors, which are herewith presented.

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Plaintiff in Error.

85 JETTY SIMON, Plaintiff in Error, }
vs.
JOHN N. CRAFT, Defendant in Error. }

In this cause the judgment of the circuit court of Mobile county, in the State of Alabama, having been affirmed, it is now certified that this, the supreme court of Alabama, is the State court of last resort and the highest court of law in the State of Alabama to which this matter can be presented or in which a decision in this suit can be had; that it was held by the supreme court of Alabama in this suit that the title of the plaintiff in error, which was otherwise undisputed, had been divested out of the plaintiff in error by certain

proceedings in the probate court of Mobile county, and that the plaintiff could not therefore recover in said suit, which was in ejectment; that the plaintiff in error claimed immunity from said proceedings under the Constitution of the United States, upon the ground that said proceedings were without due process of law, as against her, the plaintiff in error; that the decision of the supreme court of Alabama was adverse to such contention and determined that such proceedings in the said probate court *was* valid and operated to divest the title to the property in question out of the plaintiff in error, and there was thereby drawn in question, and decided adversely to the plaintiff in error, a title, right, privilege, or immunity claimed by the plaintiff in error under the Constitution of the United States of America; and this certificate is made a part of the record.

Made this the 15th day of Jan'y, 1900.

THOS. N. McCLELLAN,
Chief Justice, etc.

86 JETTY SIMON, Plaintiff in Error,
vs.
JOHN N. CRAFT, Defendant in Error.

This the 15th day of January, 1900, came the plaintiff in error, Jetty Simon, by her attorney, and filed herein and presented to me, Thomas N. McClellan, the chief justice of the supreme court of Alabama, her petition praying for the allowance of a writ of error, intended to be urged by her; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered by the supreme court of Alabama, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be necessary in the premises.

On consideration whereof the said writ of error is hereby allowed upon the appellant, Jetty Simon, giving bond according to law in the sum of two hundred and fifty dollars, which bond being forthwith given and approved, let the writ of error issue as prayed for.

Made this the 15th day of January, 1900.

THOS. N. McCLELLAN,
Chief Justice, etc.

Endorsed on cover: File No., 17,621. Alabama supreme court. Term No., 507. Jetty Simon, plaintiff in error, *vs.* John N. Craft. Filed January 29, 1900.

No. 191.

Brf. of Smith & Smith for Pl.

Office Supreme Court U.S.
FILED
DEC 24 1900
JAMES H. McKENNEY,
Clerk.

Filed Dec. 24, 1900.

Supreme Court of the United States.

(No. 191.)

O. T. 1900.

JETTA SIMON,
Plaintiff in Error,
VERSUS
JOHN N. CRAFT,
Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Appellant.

COMMERCIAL PTG. CO., MOBILE.

Supreme Court of the United States.

(No. 507.)

JETTA SIMON,

Plaintiff in Error,

VERSUS

JOHN N. CRAFT,

Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The case was tried upon an agreed state of facts (Rec. p. 9) showing that the title to the property in controversy was in the plaintiff in error (plaintiff below); that certain proceedings were had, wherein she was declared a lunatic, and that, thereupon, a guardian *of her person and estate* was appointed, and that thereafter such guardian sold the property under certain proceedings, for that purpose, to which plaintiff in error was not a party; and defendant in error (the defendant below) claimed title under and through such sale.

It was conceded by plaintiff in error that if the proceedings to declare her a lunatic were such as to constitute due process of law, and authorized an adjudication that she was a lunatic, and the appointment of a guardian of her estate, the proceedings by such guardian to sell the prop-

erty in question were sufficient, and that defendant in error has a valid title to the property in controversy, but it was contended that, under the statutes of Alabama, a guardian of the estate of a lunatic could only be appointed under a judicial ascertainment of the existence of lunacy, and that if there was no valid adjudication of lunacy, there could be no valid appointment of a guardian, and, therefore, no valid proceedings by a guardian to sell property of an alleged lunatic.

The plaintiff in error concedes that if the attempted adjudication of lunacy was merely irregular, there would be nothing upon which this Court could review the decision of the Supreme Court of the State, but it is contended that said proceedings were absolutely void because not such as to constitute due process of law.

1st. Because the statutes of Alabama do not provide due process of law for such cases.

2nd. Because due process of law was not accorded appellant in the particular case under discussion.

a. In that appellant was deprived of an opportunity to be heard in said proceedings.

b. In that the tribunal that attempted to adjudicate appellant a lunatic never acquired jurisdiction.

THESE QUESTIONS WERE RAISED IN THE FOLLOWING MANNER:

After the plaintiff in error had shown title to the property in controversy to have been in her, the defendant in error sought to show that he had subsequently derived title from her, and for that purpose offered in evidence the record and proceedings under which he claimed that the plaintiff in error had been adjudged a lunatic, in connection with other evidence by which he deraigned title from, and under such proceedings. (Rec. p. 11-40.)

The plaintiff in error (plaintiff below) objected to the introduction of the records of the proceedings to declare her a lunatic, because they were void upon the following grounds, viz:

1st. In that there was no process issued notifying Jetta Simon to be present at the trial of the inquest of lunacy that was held.

2nd. In that no provision was made in or by said proceedings whereby Jetty Simon might be present at the inquest of lunacy that was held.

3rd. In that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not.

4th. In that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy.

5th. In that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprived her of the opportunity to be heard at the inquest of lunacy.

6th. In that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy.

7th. Because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with Article V,—the amendment to the Constitution of the United States, which provides, "Nor be deprived of life, liberty or property without due process of law," and in conflict with Article XIV, amendment to said Constitution.

1 a. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

2 a. In that it authorizes a citizen to be deprived of his or her property without due process of law.

8th. Because said proceedings in the Probate Court are irrelevant and immaterial to any issue in the cause.

The Court overruled the objections of the plaintiff in error to said proceedings; to such ruling of the Court the plaintiff in error then and there excepted. (Rec. p. 40.)

At the conclusion of the case plaintiff in error (plaintiff below) asked the court to give the jury a peremptory charge to find a verdict for her; the court refused this request, and gave the jury a peremptory charge to find a verdict for the defendant, and the plaintiff in error (plaintiff below) reserved an exception to each of these rulings of the court. (Rec. p. 41.)

The case was appealed to the Supreme Court of the State, and was there affirmed, and this appeal is taken from the decision of the Supreme Court of the State and error duly assigned to the decision upon the several grounds pressed in the lower court. (Rec. pp. 58, 59, 60, 61 and 62.)

SPECIFICATION OF ERRORS RELIED UPON.

The errors assigned and relied upon may be classified and reduced to the following, viz:

The Supreme Court of Alabama erred

1. In deciding that the statutes of Alabama provide due process of law for the inquest of lunacy and in not holding that such statutes fail to provide due process.

2. In deciding that due process of law was accorded appellant in the inquisition involved in this case, and in not deciding that such proceedings did not constitute due process of law.

a. Because the plaintiff in error was deprived of an opportunity to be heard in said proceedings.

b. Because the tribunal that attempted to adjudicate plaintiff in error a lunatic never acquired jurisdiction.

These propositions are assigned upon the record in the following form:

1st. That the Supreme Court of Alabama erred in deciding that the said record and proceedings of the probate court of Mobile county, Alabama, in the matter of the inquisition of lunacy against the plaintiff in error were admissible in evidence against her.

2nd. That the Supreme Court of Alabama erred in deciding that the said proceedings in the probate court of Mobile county, by which the plaintiff in error was declared a lunatic, could not be collaterally impeached.

3rd. That the Supreme Court of Alabama erred in holding that the said proceedings in the probate court of Mobile county, by which the plaintiff in error was declared a lunatic, were supported by the service of due process of law as against the plaintiff in error.

4th. That the Supreme Court of Alabama erred in deciding that the decree of the probate court of Mobile county appointing Ralph G. Richards as the guardian of the plaintiff in error was valid and binding as against the plaintiff in error.

5th. That the Supreme Court of Alabama erred in deciding that the probate court of Mobile county had jurisdiction to appoint Ralph G. Richards as the guardian of the plaintiff in error.

6th. That the Supreme Court of Alabama erred in deciding that the said record and proceedings of the probate court of Mobile county, in the matter of the petition of Ralph G. Richards for the sale of the real estate which is the subject matter of this suit *was* admissible evidence against the plaintiff in error.

7th. That the Supreme Court of Alabama erred in deciding that the deed which was executed by Ralph G. Richards on the 11th day of May, 1899, to Henry J. Simon, operated to divest the title of the property in question out of

the plaintiff in error.

8th. That the Supreme Court of Alabama erred in holding that the proceedings had in the probate court of Mobile county for the sale of the real estate in question and the decree authorizing said sale under which Ralph G. Richards conveyed the property in question to Henry J. Simon *was* not void for want of due process of law as against the plaintiff in error.

9th. That the Supreme Court of Alabama erred in holding that the circuit court of Mobile County did not err in charging the jury as follows: "If the jury believe all of the evidence in the case, they ought to find a verdict for the defendant."

10th. That the Supreme Court of Alabama erred in holding that the circuit court of Mobile County did not err in refusing the written request of the plaintiff in error to charge the jury: "If the jury believe all of the evidence in the case, they ought to find a verdict for the plaintiff for the lands described in the complaint."

11th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error first objection "to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law."

12th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error second objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that there was no process issued notifying Jetty Simon to be present at the trial of the inquest of lunacy that was held."

13th. That the Supreme Court of Alabama erred in de-

ciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error third objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that no provision was made in or by said proceedings whereby said Jetty Simon might be present at the inquest of lunacy that was held."

14th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error fourth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not."

15th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error fifth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy."

16th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error sixth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprived her of the opportunity to be heard at the inquest of lunacy."

17th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error seventh objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy."

18th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error eighth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with Article V—the amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law, and in conflict with Article XIV of the amendment to said Constitution.

a. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

b. In that it authorizes a citizen to be deprived of his or her property without due process of law.

19th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error ninth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic, "because said proceedings in the probate court are irrelevant and immaterial to any issue in the cause." (Rec. pp. 60, 61 and 62.)

ARGUMENT.

I.

THE PROCEEDINGS BY THE ALLEGED GUARDIAN TO SELL THE PROPERTY IN CONTROVERSY NECESSARILY DEPEND, FOR THEIR VALIDITY, UPON THE VALIDITY OF THE PROCEEDINGS IN THE INQUEST OF LUNACY.

The plaintiff in error was not a party to the proceedings by the guardian to sell the property in question; such proceedings proceeded upon the theory that she had been duly adjudged a lunatic, and that petitioner had been duly appointed the guardian of her person, and her estate, and that she was therefore represented by him. (See proceedings, Rec. pages 27 to 40); these proceedings must, therefore, necessarily depend, for their validity, upon the validity of the proceedings under which the plaintiff in error was declared a lunatic, and the petitioner appointed her guardian; as independent proceedings, they were void, because the plaintiff in error was not a party to them, and was not served with notice of them.

Scott vs. McNeal, 154 U. S., 34.

Molton vs. Henderson, 62 Ala., 426-430.

This proposition has always been conceded by both counsel and court.

THE STATUTE OF ALABAMA PROVIDING FOR AN INQUISITION OF LUNACY DOES NOT AFFORD THE ALLEGED LUNATIC AN OPPORTUNITY TO BE HEARD, AND AUTHORIZES AN ADJUDICATION AFFECTING BOTH PERSONAL LIBERTY AND THE RIGHTS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Under these statutes, the alleged lunatic may, or may not, be allowed an opportunity to appear and defend the charge of lunacy brought against her; if allowed such op-

portunity, she would not be heard to complain, but in this case the writ directed the sheriff to take plaintiff in error into custody, and did not require him to have her present at the trial, but authorized him to determine whether it was consistent with her health and safety to be present at such trial, and he determined this question against her without giving her any opportunity to be heard, and, in fact, without any hearing, and retained her in custody, and did not allow her to be present at the inquest of lunacy. The statute has then operated to deprive plaintiff in error of her liberty and property without a hearing, and if the proceedings are justified by the statute, then the statute is in conflict with the Constitution of the Unied States in that it authorizes citizens to be deprived of their liberty and property without due process of law, and the case presented is a proper one to be reviewed by the Supreme Court of the United States.

THE STATUTE.

The statute provides that upon the filing of a petition for an iquisition of lunacy, a writ be issued, "directed to the sheriff *to take* the person alleged to be of unsound mind, and *if consistent with his health or safety,* have him present at the place of trial;" it provides no method by which the person taken can appear, or obtain a hearing, if the sheriff declares that it is not consistent either with his safety or with his health for him to appear, nor does it provide any method by which the sheriff shall determine this all important question, but authorizes an adjudication depriving the alleged lunatic, both of his liberty and his property in his absence, and without his having any opportunity to be heard, upon the mere return of the sheriff, that it is not consistent with the safety or health of the alleged lunatic to be present at his trial. This does not constitute

due process of law, because it affords no opportunity to be heard.

The statutes authorizing such proceedings are as follows:

SECTIONS OF THE CODE OF 1886 IN FORCE AT THE TIME OF THE PROCEEDINGS IN QUESTION.

(Code of 1886.)

2390, (2753, 2754). APPOINTMENT.—The court of probate has authority and it is a duty to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the State, having within the county property requiring the care of a guardian, under the limitations, and in the mode hereinafter prescribed.

2391. GUARDIAN NOT APPOINTED UNTIL AFTER INQUISITION.—A guardian for a person alleged to be of unsound mind, residing in the county, must not be appointed until an inquisition has been had and taken as hereinafter directed.

2392. (2757). INQUISITION PROCEEDINGS.—Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the court of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof.

2393. (2758). JURY SUMMONED; WRIT OF ARREST. The judge of probate must issue a writ directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof; and also

issue subpœnas for witnesses, as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.

2394. (2759). OATH OF JURORS; VACANCIES FILLED. At the time set for the trial, if good cause be not shown for continuance, the jury must be impanelled and sworn well and truly to make inquisition of the facts alleged in the petition, and a true verdict rendered according to the evidence. If any of the jurors are excused from serving, fail to attend, or are set aside for any cause, their places may be supplied from the bystanders.

2395. (2760). ON VERDICT OF INSANITY, PAPERS FILED AND GUARDIAN APPOINTED.—If the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition, and all the proceedings thereon to be recorded, and appoint a suitable guardian of such person.

What constitutes due process of law is fully discussed under the next proposition in this brief, and as the legal principles there discussed are equally applicable to the question here presented, we will merely refer to them as applicable to the matter here in hand.

III.

DUE PROCESS OF LAW WAS NOT ACCORDED PLAINTIFF IN ERROR IN THE INQUISITION OF LUNACY PROCEEDINGS IN THAT SHE WAS DEPRIVED OF AN OPPORTUNITY TO BE HEARD.

The inquisition of lunacy was commenced by a petition filed by one Ralph Richards in the probate court of Mobile county, alleging that plaintiff in error was a lunatic; upon the filing of the petition the judge of probate made an order

fixing a day to hear the matter, and further ordering "that a writ be issued to said sheriff requiring him to take the said Jetty Simon *so that he have her in this court to be presented at said trial if consistent with the health and safety of said Simon.* The writ that was issued did not, however, pursue the terms of the order, but, after reciting the proceedings, directed the sheriff as follows:

"Now, therefore, *if it be consistent with the health and safety of said Jetty Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be empannelled to make said inquisition.*"

The sheriff did not obey the letter of the writ, *but took the body of plaintiff in error, and did not have her present at the trial,* but made return that he did not have her there, because it was inconsistent with her safety or health to do so, and *the court proceeded to adjudicate her a lunatic, while she was absent and in the custody of the sheriff, and was thereby prevented from being present.*

These proceedings are set forth in the Record, pp. 19-25, and, omitting, as immaterial, the names of the jurors in the writ, directing the sheriff to summon a jury, his return thereon, and the bond which was executed by Richard for the faithful performance of his duties as guardian, were as follows:

PROCEEDINGS:

IN RE JETTY SIMON, A PERSON OF UNSOUND MIND,

PETITION FOR INQUISITION OF LUNACY.

The State of Alabama, }
Mobile County. }

IN PROBATE COURT, MOBILE COUNTY.

To the Honorable Price Williams, Judge of said Court:

Your petitioner, Ralph G. Richards, respectfully repre-

sents unto your honor that he is a friend to one Jetty Simon and of her family; that said Jetty Simon is a female of the age of forty-nine years, and resides in Mobile, and is of unsound mind and incapable of governing herself or of conducting and managing her affairs.

Wherefore your petitioner prays your honor to take cognizance of the matter of this his petition and appoint a day for hearing the same, and that such proceedings may be had as shall be necessary and proper to determine according to law in such case whether or not the said Jetty Simon is a person of unsound mind.

RALPH G. RICHARD.

The State of Alabama, }
Mobile County, }

Before me personally appeared Ralph G. Richard, who, being duly sworn, deposes and says that he is fully informed of the allegations contained in the foregoing petition, and that he believes the same to be true, as therein stated.

RALPH G. RICHARD.

Sworn to and subscribed before me this 29th day of January, 1889.

HENRY HANAW,
Notary Public, Mobile Co., Ala.

Filed January 31st, 1889.

THOMAS KIERNAN, Clerk.

The verdict of the jury, endorsed upon the back of said petition, is as follows, viz:

"We, the jury, find Mrs. Jetty Simon, to be of unsound mind.

JOHN POLLARD, JR., Foreman."

JETTY SIMON, an Alleged Lunatic.

January 30th, 1889.

This day came Ralph G. Richard, and filed his petition in due form and under oath, alleging that said Jetty Simon, a female resident of this county and of age, is of unsound mind and incapable of taking care of herself or of managing her affairs, and praying that the necessary proceedings may be had so as to have due inquiry and determination as to the truth of said allegation. It is therefore ordered that the 6th day of February, 1889, be appointed as a day for the hearing of said petition, and that a jury be drawn, as the law directs, for the trial of this issue. It is further ordered that a writ be issued to said sheriff requiring him to take the said Jetty Simon so that he have her in this court to be presented at said trial if consistent with the health and safety of said Simon.

IN THE MATTER OF JETTY SIMON, ALLEGED *NON COMPOS MENTIS*,

WRIT.

The State of Alabama, }
Mobile County. }

In Re PROBATE COURT.

To the Sheriff of said County:

Whereas, Ralph G. Richard, as the friend of one Jetty Simon, hath this day filed his petition with the judge of said court, alleging that said Jetty Simon is a female lunatic, of the age of forty-nine years, and a resident of this county, and praying that an inquisition of lunacy may be made and had in due form of law to try the truth of said allegations and as—whether the said Jetty Simon is incapable of governing herself and of attending to her affairs; and whereas the judge of said court has by due order en-

tered in the premises appointed the sixth (6th) day of February, 1889, for hearing said petition and for the due trial thereof:

Now, therefore, if it be consistent with the health and safety of said Jetty Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be empannelled to make said inquisition.

And have you then and there this writ with your return thereon as to how you have executed the same.

Witness, Price Williams, Jr., as judge of said court, at office in the City of Mobile, this the 30th day of January, A. D., 1889.

PRICE WILLIAMS, JR., Judge.

Received January 31st, 1889, and on the same day I executed the within writ of arrest by taking into my custody the within named Jetty Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety of the within named Jetty Simon to have her present at the place of trial, and on the advice of Dr. H. P. Hirshfield, a physician whose certificate is hereto attached, she is not brought before the honorable court.

W. H. HOLCOMBE, Sheriff.
By WM. H. SHEFFIELD, D. S.

Mobile, February 5th, 1889.

IN THE MATTER OF JETTY SIMON, ALLEGED *NON COMPOS MENTIS.*

CERTIFICATE OF PHYSICIAN.

Mobile, Ala., January 30th, 1889.

To the Sheriff of Mobile County, Ala.:

I, H. P. Hirshfield, a regular physician, practicing in Mobile County, Ala., hereby certify that I am acquainted

with Mrs. Jetty Simon, and have examined her condition on yesterday and find that she is a person of unsound mind, and it would not be consistent with her health or safety to have her present in court in any matter now pending.

H. P. HIRSHFIELD, M. D.

Probate Court, February 6th, 1889.

JETTY SIMON, ALLEGED *NON COMPOS MENTIS*, ESTATE OF.

The State of Alabama, }
Mobile County. }

In the matter of petition to enquire into her lunacy.

To Fielding Vaughan, Esquire:

You are hereby notified that you have been appointed guardian *ad litem* of Jetty Simon, alleged *non compos mentis*, interested in a certain matter and proceeding in said court, entitled as appears in the caption hereof, and which comes up for hearing on the sixth day of February, A. D., 1889.

Witness, Price Williams, Jr., Judge of said court, at office, the sixth day of February, A. D., 1889.

Attest: FRANCIS KIERNAN, Clerk.

February 6th, 1889.

I hereby accept service of the above notice, and consent to act as guardian *ad litem* for Jetty Simon.

FIELDING VAUGHAN.

Filed Feb'y 6, '89.

P. WILLIAMS, Jr., Judge.

IN THE MATTER OF THE PETITION OF RALPH G. RICHARD TO DECLARE MRS. JETTY SIMON *NON COMPOS MENTIS.*

Answer of Fielding Vaughan, guardian *ad litem* for said Simon.

This day comes Fielding Vaughan, and as guardian *ad litem* for Jetty Simon, an alleged lunatic, for answer to the petition of Ralph G. Richard, says that he wholly denies all the matters and things stated and contained in said petition, and requires strict proof to be made thereof according to law.

February 6th, 1889.

FIELDING VAUGHAN,
Guardian *ad litem* for Jetty Simon.

Filed February 6, 1889.

P. WILLIAMS, JR., Judge.

JETTY SIMON, Lunatic.

The State of Alabama, }
Mobile County. }

Probate Court of said County.

February 6th, 1889.

This being the day appointed by reference to an entry thereof made upon the minutes of the court on the 30th of January, 1889, for the hearing of the petition, Ralph G. Richards, filed, alleging the lunacy of the said Jetty Simon, and praying an inquisition thereof, and it being shown that it would not be consistent with the health and safety of said lunatic to bring her into court at this time, and it appearing that due process had been served upon said luna tic notifying her of this proceeding, now comes the said Richard and a jury of good and lawful men, who reside in

the county of Mobile, and who, having been summoned, to-wit: John Pollock, Jr., and eleven others, who, having heard the evidence, the arguments of counsel, and the charge of the court in the premises, and being first duly tried, empannelled, and sworn well and truly to make inquisition of the facts alleged in said petition, and a true verdict to render according to the evidence, upon their oath say: "We, the jury, find Mrs. Jetty Simon, to be of unsound mind."

It is ordered, adjudged and decreed by the court that said petition, and all other petitions thereon, together with the aforesaid verdict of said jury declaring the said Jetty Simon a lunatic be recorded.

JETTY SIMON, *Non Compos Mentis*, Estate of,

APPOINTMENT OF GUARDIAN.

February 11th, 1889.

This day comes Ralph G. Richard and applies for letters of guardianship over the estate of said lunatic, and he now entering into bond and security in the sum of $7,000.00 with H. J. Simon and M. Goldstein as his sureties, which bond, with said securities, has been taken and approved by the judge of this court, it is ordered and decreed that letters of guardianship over the estate of said Jetty Simon, lunatic, issue to Ralph Richard.

The State of Alabama, }
Mobile County. }

Whereas, on the eleventh (11th) day of February, 1889, Ralph G. Richard was by the honorable the probate court of Mobile county, State of Alabama, appointed guardian over the person and estate of said Jetty Simon, *non compos*

mentis, and the said Ralph G. Richard having complied with the requisites of the law in such cases made and provided, these are therefore to give said Ralph G. Richard, in whose fidelity in this behalf we very much confide, full power and authority to demand, receive, and secure, all and singular, the estate and all debts, dues and demands whatsoever to said minor belonging, and to do all other acts and things concerning said guardianship in as full and complete a manner as if the same was herein particularly expressed.

Witness, Price Williams, Jr., judge of said court, this 11th day of February, 1889.

P. WILLIAMS, JR., Judge.

It plainly appears from these proceedings that the plaintiff in error was taken into custody and not allowed to be present at the trial of the inquisition of lunacy.

THE LEGAL QUESTION TO BE DETERMINED IS WHETHER THERE CAN BE DUE PROCESS OF LAW, WHERE A PERSON IS DEPRIVED OF THE RIGHT TO BE PRESENT AND HEARD IN A PROCEEDING BY WHICH SHE IS DEPRIVED BOTH OF HER LIBERTY AND PROPERTY.

Speaking of this precise question, in the case of Windsor vs. McVeigh, 93 U. S., page 278, Mr. Justice Field observed:

"The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial in such a case to a party of the right to appear is in legal effect the recall of the citation to him." Again, on page 277, quoting from the case of McVeigh vs. United States, 11 Wallace, page 267, Justice Field says: "The order in effect denied the respondent a hearing. It is alleged that he was in the

position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Proceeding to comment upon this language, Mr. Field says: "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard," and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard."

The suggestion contained in the opinion of the majority

of the Supreme Court of Alabama (Record p. 48) that the inquisition of lunacy was in the nature of a proceedings *in rem*, and that jurisdiction attached upon the filing of the petition to have Mrs. Simon declared a lunatic, *and that all other* defects in the proceedings constituted mere irregularities and could not be reached upon collateral attack, was not intended to refer to an omission of the service of due process of law so as to bring the alleged lunatic before the court to defend, but if it be so understood, it is fully answered by the case of

Windsor vs. McVeigh, 93 U. S., 278,

and those of

Scott vs. McNeal, 154 U. S., 46,
Bradstreet vs. Nep. Ins. Co., 3 Sumner, 601,
Same case, Federal cases, No. 1793.

Speaking of this contention, Mr. Justice Field says, 93 U. S., page 279: "A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner in person or by agent, and that its seizure will, therefore operate to impart notice to him. Where notice is given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising

from the seizure, prescribing the time within which the appearance must be made, is essential. * * * * * * * The manner of the notification is immaterial, but the notification itself is indispensible."

In the case of Bradstreet vs. Neptune Insurance Co., 3rd Sumner, 601 (S. C. Fed. Cases No. 1793), Judge Story, after pointing out at some length, the necessity for an opportunity of hearing in cases *in rem*, proceeded: "It is a rule found in the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned, and the charges on which the condemnation is stated shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, *so that the parties in interest have no opportunity of appearing and making a defense*, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of the judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more in common sense and in common honesty, than the sentence of the tribunal which first punishes and then hears the party,—*castigatque, auditque.*"

It seems, therefore, too clear for argument that the denial of an opportunity to be heard is in effect a denial of notice of the proceedings and that an opportunity to be heard is made necessary by constitutional requirements as to due process of law.

In the case of Smith against Woolfolk, 115 U. S., page 149, the Supreme Court of the United States spoke as plainly upon this subject as language will permit, when it said: "For the decree of a court rendered against a party who has not been heard, *and has had no chance to be heard,*

is not a judicial determination of his rights, and is not entitled to respect in any other court."

In the case of Fallbrook Irrigation District vs. Bradley, 164 U. S., page 172, the court said: "*The obvious purpose of publication of the notice of the intended presentation of the petition is to give to those who are in any way interested in the proceeding*, an opportunity to appear before the board and be heard upon all the questions of fact, including the question of benefits to lands described in the petition."

In the case of McVeigh vs. U. S., in the 11 Wallace, page 267, the court said: "The order in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice."

In the case of Lent vs. Tillson, 140 U. S., page 327, the court, quoting from the case of Hagar vs. Reclimation District in 111 U. S., page 701-8, it was said: "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings which imply that the party to be affected shall have notice *and an opportunity to be heard;* so also where the title or possession of property is involved."

In the case of Hagar against the Reclimation District No. 108, reported in 111 U. S., page 708, the court said: "It is sufficient to observe here that by 'due process' is meant one which following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted t the ends to be attained; and whenever it is nec-

essary for the protection of the parties, it must *give them an opportunity to be heard respecting the justice of the judgment sought.* The clause in question means, therefore, that there can be no proceedings against life, liberty or property, which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

The same general principles are fully reviewed in the cases of

Pennoyer vs. Neff, 95 U. S., 714;

and in

St. Clair vs. Cox, 106 U. S., 350.

In the case of Burns vs. Mulnomah Railroad Company, 15 Fed. 183, the court, speaking of due process of law as required by the Fourteenth amendment, observed: "And this, it is generally agreed, includes at least legal notice of the proceeding and a prescribed opportunity to be heard upon the question involved therein."

In the Railroad Tax cases, 13 Fed., page 751, Justice Field observed: "There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording *him an opportunity of being heard* respecting the correctness of their action. * * * * * It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property, without an opportunity of being heard against the proceeding. The principle is as old as the Magna Charta, and is embodied in all of the state constitutions, and in the Fourteenth amendment of the Federal Constitution."

Nowhere is the fact that the constitutional guaranty of due process of law confers an absolute right, on the person

proceeded against, to be present at the hearing, more clearly enunciated than in Alabama. In the case of

Zeigler vs. S. & N. Ala. R. R. Co., 58 Ala., 599,

it is said: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved." In the case of

Calhoun vs. Fletcher, 63 Ala., 584-5,

the court, citing Cooley's Constitutional Limitations, pages 368-69, said:

"In judicial investigations, the law of the land requires an opportunity for a trial; there can be no trial if only one party is suffered to produce his proofs."

From these authorities, it is perfectly clear, as it would be without any authority, that the proceedings of lunacy which were conducted in the probate court, while Mrs. Simon remained in the custody of the sheriff, and was by him, under the writ in this very cause, physically restrained from appearing, could not properly be dignified with the name of judicial proceedings.

It would hardly be contended that in proceedings, in any civil cause involving property, it would constitute due process of law to arrest and imprison the defendant under a writ issued in the cause, and at the same time notify him of the time and place of trial, and then keep him in custody, and not allow him to attend the trial; unless, therefore, there is a distinction between the inquisition of lunacy and all other civil proceedings, our statute, if it authorized the proceedings had in this cause, and the proceedings themselves, whether authorized by the statute, or not, conflicted with and violated the Fourteenth amendment of the Constitution of the United States.

AN INQUISITION OF LUNACY IS A JUDICIAL PROCEEDING TO WHICH THE PROVISIONS OF THE FEDERAL CONSTITUTION AS TO DUE PROCESS OF LAW ARE APPLICABLE.

The attorney for the defendant in error argued in the court below that an inquisition of lunacy is a "judicial proceeding" constituting a cause in court; this is admitted. There is an abundance of authority in the United States for the proposition that an inquisition of lunacy is in the nature of a judicial proceeding against the liberty and property of the alleged lunatic, in which his right to notice and an opportunity to be heard is guaranteed by the Fourteenth amendment to the Constitution of the United States.

Defendant in error contends that an inquisition of lunacy under the statutes of Alabama partakes of the nature of the common law proceedings, and that, under the common law, no notice to the alleged lunatic was required. It is not material whether notice was required at common law, or not. The Federal Constitution expressly requires notice and an opportunity to be heard before condemnation in every proceeding against the life, liberty or property of a citizen, and this guaranty is not, like that of the right to trial by jury, limited to cases where the right existed at common law, but we think the contention as to the proceedings at common law inaccurate.

COMMON LAW INQUISITION OF LUNACY.

The whole proceeding of lunacy, at common law, appears to have grown out of the Statute Seventeen, Edward the Second, conferring on the king as *parens patriae,* the power to take care of the property of lunatics and idiots; as to the former as mere trust, as to the latter as a trust coupled with an interest. In consequence of the oppressive conduct

of the Escheators, whose office it was to make inquiries concerning any matter, which gave the king a right to the possession of the lands, tenements, or chattels, it became necessary to provide that no seizure should be made into the king's hands, without office found.

Shelford on Lunatics, page 74-5.

Thus it was that occasion arose for the issuance by the Lord Chancellor, of what was known as the "Commission of Lunacy," the purpose of which was to enquire as to whether or not the alleged lunatic was, in fact, *non compos mentis*, or as to whether it was necessary that a notice of the issuance of his commission should be served upon the party alleged to be insane.

Lord Chancellor Erskine, in the case of

Ex parte Cranmer, 12 Vesey, 455,

declared: "The party certainly must be present at the execution of the commission. It is his privilege."

In the case of

Heli, 3rd Atkyns, 635,

the Lord chancellor declared: "That though a man be found an idiot by inquisition taken before the sheriff, and by their examination, and that be returned into the Chancery, yet he who is so found idiot may in person, or by his friends, come into Chancery before the Chancellor, and show the matter and pray that he may be examined before the Chancellor, whether he be idiot or not, and if upon such examination he be found no idiot, then in the inquisition found before the sheriff, and also the examination which the sheriff hath made and returned thereupon, shall be of no effect, but the same office shall be taken as void without any other traverse."

Mr. Shelford, in his work on Lunatics, page 100, expresses the same opinion thus: "The supposed lunatic, himself, has the right to be present at the execution of the

commission." It is to be observed, however, that the issuance of this commission was only, in effect, the appointment of a board of reviewers. Mr. Shelford, on page 101 of his work on Lunacy, explains that the proceedings upon the inquest of office, was an *ex parte*, proceeding, *and was not conclusive.* In other words, the proceedings of the commission was in the nature of an investigation before the grand jury and determined, not whether the party was a lunatic, but whether the government should maintain that he was so, and put him to a trial of the matter. It seems that at a very early date in the history of England, it was regarded as discretionary with the Lord Chancellor whether the alleged lunatic upon the inquest of office should be allowed the opportunity of traversing the inquest of lunacy, but, however this may have been, it was by the statute of the Second and Third Edwards the Sixth, chapter eight, Sec. Six (2 Inst. page 688) provided that every alleged lunatic, aggrieved by any such office or inquisition, "Shall and may have his or her traverse to the same immediately or after his or their pleasure, and proceed to the trial therein, and have like remedy and advantages as in other cases of traverse upon untrue inquisition of office founden; any law. usage or custom to the contrary in anywise, notwithstanding."

Upon the construction of this statute the authorities in England are conflicting, and for a long time the interpretation of the act was in doubt, but it seems now to be settled that the statute makes the traverse of inquisition a matter of right.

Ferne *ex parte*, 5 Vesey, 832.
Ex parte Wragg, 5 Vesey, 450.
Wards *ex parte*, 6 Vesey, 579.
Ex parte Hall, 7 Vesey, 260.
Serwood vs. Sanderson, 19 Vesey, 280.
Re Bridge, 1st Craig & P., 338.

Re Cummings, 1st De Gex, M. & G., 537.
Shelford on Lunatics, page 113.
Stock on *Non Compos Mentis*, star page 107.

Thus it appears that in England the right of a hearing upon the question involved, was secured to the alleged lunatic by statute as early as Edward the Sixth, and if that portion of the common law which pertained to the inquisition of lunacy had been applicable to our institutions, they would have come into the body of the laws of Alabama with this statute fixed upon them as an integral part.

Carter vs. Balfour, 19 Ala. 829.

The Statute Seventeen, Edward II., whereby the king becomes the guardian of the lunatics, and upon which the entire proceedings for the commission of lunacy stood for a foundation, was not, however, adapted to American Institutions, and neither it, nor the proceedings for its enforcement, ever became a part of the common law of the State of Alabama.

Whetstone vs. Whetstone, 75 Ala., 498.

AMERICAN DECISIONS.

From what we have said, it clearly appears that by common law no party could be declared a lunatic and deprived of the control of his property without an opportunity of trying the question, but that the proceedings for an inquisition of lunacy in the United States, rests entirely upon American statutes, and have no connection with the proceedings as it existed at common law. We turn, therefore, to an examination of the American decisions upon this subject, and from them we learn that an inquisition of lunacy is a judicial proceeding , whereby the alleged lunatic is deprived both of his liberty and property; that the very question at issue in such a proceeding, is his sanity,

vel non, and that both the proceedings and the right against which it is directed, are such as fall directly within the constitutional guaranty of the Fourteenth Amendment. In no place has this been more distinctly decided than in Alabama.

Eslava vs. Lepretre, 21 Ala., 504-522.
Molton vs. Henderson, 62 Ala., 430.
McCurry vs. Hooper, 12 Ala., 823.

In the case of Evans vs. Johnson, W. Va., 19 S. E., page 623, it is said: "It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said in answer to this that he is insane, and that notice to an insane man will do him no good? The response is that his insanity is the very question to be tried, and he the only party interested in the issue. Often, if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often if not given notice, those interested in using or robbing him of his property, will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice."

In the case of Willman, 45 Pac. R. (Kansas), 726, the alleged lunatic was restrained of her liberty pending the proceedings, and in speaking of the right of due process of law, the court said: "This right is denied unless an opportunity is afforded to be present to exercise it. The express granting of the right to appear necessarily implies that notice should be given of the time and place of hearing, and of

the nature of the proceedings to be had. Even though the statutes made no special provision with reference thereto, we think the same right would exist, with the necessity for notice to the party to be affected by the proceedings.

Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere *ex parte* proceedings can affect either personal or property rights. Were the legislature to attempt to enact a law authorizing judicial proceedings, the object of which was to affect the person or property of a citizen without notice or opportunity to be heard, such legislation would be rejected and repudiated, in advance, as an intolerable outrage upon the rights of the citizen. It would not only be a serious infringement of natural rights, but would be a flagrant violation of the constitutional guaranty that no person shall be deprived of his liberty or property without due process of law. Notice and *opportunity to be heard* lie at the foundation of all judicial procedure. They are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals and the most sane member of the community might be adjudged insane and landed in the mad-house. It will not do to say it is useless to serve notice upon an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry, the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist in law until it is established by evidence in a proper proceeding."

In the case of Chase vs. Hathaway, 14 Mass., 222, the court said: "We are of the opinion that, notwithstanding the silence of the statute, no decree of a probate court, so materially affecting the rights of property and the person, can be valid, unless the party to be affected has had an op-

portunity to be heard in defense of his rights."

In the case of McCurry vs. Hooper, 12 Ala. 823, Judge Dargan, speaking of this question, said: "I think it is a fundamental principle of justice, essential to the rights of every man, that he shall have notice of any judicial proceedings that are about to be had for the purpose of divesting him of his property, or the control of it, *that he may appear and show to them who sit in judgment on his rights*, that he has not lost them by the commission of a crime, nor should those rights be taken from him by reason of any misfortune; *that he has the right to appear before the jury and the court, and to show that he is not insane*, that he and his property should not be put in charge of another, is a self-evident truth and is denied by no legal authority."

Speaking of this matter in the case of

Allis v. Morton, 4 Gray (Mass.) 64,

the court said: "To say one is insane, and, therefore, need not be notified, is to decide the question before it is tried, nor would the existence of insanity be a good reason for dispensing with the notice. A man may be insane, so as to be a fit subject for guardianship; yet have a sensible opinion and strong feeling upon the question, who that guardian shall be." To the same effect are the following cases:

Re Dickie, 7 Abb., N. C., (N. Y. Sup.) 417.
Martin vs. Motsinger, 30 N. E. 524.
Evans vs. Johnson, 19 S. E. 624.
Hathaway vs. Clarke, 5 Pick., 490.
Hutchins vs. Johnston, 12 Conn. 376.
Broad vs. Budlong, 51 Barbour 493.
Stafford vs. Stafford, 1 Martin (N. S.) 551.
Eddy vs. People, 15 Ill. 386.
Sumway vs. Sumway, 2 Ver., 339.
Ex parte Dozier, 4 Baxter 81.

Commonwealth vs. Kirkbridge, 2 Brewst. 419.
Morton vs. Sims, 44 Ga. 298.
Jessup vs. Jessup, 34 N. E. 1017.
Whitenack case, 2 Green, Chy., N. Y. 253-4.
Bush on Insanity, p. 55.
Stock on *Non Compos Mentis*, Sec. 100.

In one case, at least, it has been held that the actual presence of the lunatic is essential.

In re Whetmore vs. Whetmore, 33 Pac. 617.

In answer to all we have said upon this point, the Supreme Court of Alabama have been content to reply, "We do not doubt she was brought into court in the manner prescribed by statute," (Record p. 48), or in other words, that the enactment of the statute, converted the service of the statutory notice into due process of law, even though it provided for no hearing.

Of the same nature is the contention heretofore, and presumably still, put forward by the defendant in error, that since the Probate Court of Mobile, in appointing Mr. Richard, declared that "due process had been served upon the lunatic," this declaration was binding upon her in every tribunal in which these proceedings might be made the basis of an alleged right against her. To hold that either the Legislature or a Court of a State can, by its declaration, make anything which it may choose to so declare, effective as the service of due process of law, would entirely nullify the fourteenth amendment of the Constitution of the United States, or at least the power of the Federal Courts to enforce its provisions. It is not our purpose to deny that in many of the States it has been held that where jurisdictional facts are ascertained by the Court rendering a judgment, such judgment cannot be collaterally impeached in the Courts of the same jurisdiction. It is not necessary that we should consider

the correctness of this doctrine, as to which there is a grave conflict in the authorities throughout the country.

Black on Judgments, section 275.

Whatever view may be taken of this doctrine as applied to jurisdictional facts other than the service of notice, so as to afford the defendant the opportunity of testing the jurisdiction of the court upon a direct appeal, this doctrine when applied to false recitations contained in a judgment to the effect that the party sought to be bound has been duly served with notice, or afforded an opportunity of being heard, appears to our mind to be contrary to the first principles of natural justice. Such recitations are material only so far as they constitute adjudications, and no action by a court is entitled to be called an adjudication until the parties are brought before it.

Upon this subject, the decisions of the Supreme Court of Alabama are not in harmony. Before undertaking to discuss them, however, we must submit that the doctrine, even if thoroughly established in Alabama, could not avail the defendant in error.

1st. Because the recitation contained in the decree of the Probate Court in the matter of the appointment of the guardian, was not an adjudication that notice had been served upon the defendant, and that Mrs. Simon was afforded an opportunity of being heard, but is an attempted adjudication in her absence, that the notice given to her, although accompanied by the arrest of her person and her detention in the custody of the sheriff, so as to deprive her of all opportunity of being heard, constituted the service of due process of law. By the agreement of counsel upon which this case was tried, record, page 12, paragraph fourth, it was expressly admitted that the service shown by the return of the sheriff, record pages 20-21, the effect of which we have already

discussed, was the only process which was served in this cause. But even in those States which hold that a recitation of the service of process, cannot be collaterally impeached, the doctrine has always been limited to cases where the recitation was not expressly contradicted by other portions of the record.

Beasley *et al.* vs. Howell, Adm., 117 Ala. 505.
Harris vs. Clellanhan, 11 Lea 181.
Black on Judgments, section 723.

Indeed the language of this court in the case of Settlemire vs. Sullivan, 97 U. S. 448, would seem to be conclusive. It is there said: "Here it is contended that the recital in the entry of the default of the defendant in the case in the State court, 'that, although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is, that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former.

We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority —that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly

brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. 'If, for example,' to give an illustration from the case of Galpin vs. Page, (18 Wal. 366), 'It appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also."

2nd. Nor can it be doubted that the Federal Courts are of foreign jurisdiction to those of the State, or that any judgment of a State Court which is relied upon as the basis of a right may be collaterally attacked in the Federal Court, because of the want of jurisdiction either of the subject matter, or of the parties.

Cooper vs. Newall, 173 U. S. 567.
Thornman vs. Frame, 176 U. S. 356.

There seems really to be no distinction between the question as to whether the Legislature of a State may, by its declaration, constitute whatever formality it may choose, the service of due process of law, so as to bind those who have really no notice or opportunity to defend, and the question as to whether a court of a State may, by so declaring, accomplish the same purpose. That the Legislature of a State cannot bind the Supreme Court of the United States by its enactments as to what shall constitute the service of due process of law, has been thoroughly established.

The Dartsmouth College Case, 4 Wheat. 518, 581.

Chicago & Burlington R. R. Co. vs. Chicago, 116 U. S. 232.
Smyth vs. Ames, 169 U. S. 527.
Davidson vs. New Orleans, 96 U. S. 102.
Ziegler vs. S. & N. Ala. Rd. Co., 58 Ala. 594.
Cooley on Constitutional Limitations, p. 431.

And we understand the same rule to have been repeatedly announced in reference to the collateral attack upon the judgments. No better statement of the reason for our contention could be made than that of Mr. Justice Bradley, in the case of Thompson vs. Whitman, 18 Wallace 468, where it is said: "But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statement could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

Indeed to say that the plaintiff in error is now precluded from questioning the validity of the proceedings in the Probate Court for the want of the service of due process of law, because of the recitations contained in the judgment, which is itself contradicted by the return of the sheriff contained in the record, is to assume its validity and binding effect as a basis upon which to argue the truth of the premises assumed. There are two cases which so much resemble the case at bar in this particular as to call for their especial citation.

Windsor vs. McVey, 93 U. S. 274.
Scott vs. McNeal, 154 U. S. 34.

Upon the right of the defendant to collaterally attack

the enforcement of any judgment which may be rendered against him without the service of due process of law, depends the correctness of those cases in which it has been held in this court, that the mere entry of a judgment, without the service of due process of law, does not deprive the defendant of his life, liberty and property without due process of law, because such a judgment is a mere nullity which will not be given any force or effect in any other tribunal.

York vs. Texas, 137 U. S. 15.
Kaufman vs. Wooters, 138 U. S. 285.

In the case of the Guaranty Company vs. Green Cove Springs & Melrose R. R. Co., 139 U. S. 147, the court said: "It was said by Mr. Justice Wayne, in Williamson vs. Berry, 8 How. 495, 540, in reply to an argument that a decree in chancery court not be looked into in a collateral way, that 'it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law.' The decisions of this court upon this subject, beginning in the year 1794 with the case of the Betsey, 3 Dall. 6, have been uniform and consistent."

Noble vs. The U. S. River Logging R. R., 147 U. S. 173.
Earle vs. McVey, 91 U. S. 503.

Elliott *et al.* vs. Piersoll, 1 Peters 340.
Williamson vs. Berry, 8 [redacted] (U. S.) 541.

Prior to the decision which is now appealed from, it has always been held in Alabama, that the appointment of a guardian by any Probate Court may be collaterally impeached in any other court of that State.

Molton vs. Henderson, 62 Ala. 426.
Eslava vs. Papretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.

There exists, so far as we have been able to learn, no case in Alabama in conflict with these decisions.

There is, however, a long line of opinions in the State, holding and holding correctly, that a sale by the probate court of property *belonging to the estate of a deceased person* cannot be attacked collaterally, if based upon a petition of a regularly appointed administrator, containing the necessary jurisdictional allegations.

These decisions have been cited and argued with great persistency by the defendant in error, as applicable to this case, which is a sale by an alleged guardian—the distinction between the two classes of cases and the decisions cited *supra*, being entirely ignored.

These cases, however, will be found upon examination to be clearly distinguishable from, and not at all in conflict with, those relied upon by plaintiff in error, and above cited. In all of the Alabama cases cited by defendant in error it will be seen that the probate court *had jurisdiction* to appoint an administrator—that is, there was in fact a decedent of whose estate an administrator could be appointed, and *that there was a vacancy in such administratorship,* no administrator having been

appointed, or the administrator having been removed if he had been appointed. It is true that, as a general rule, where the probate court exercises the power to appoint an administrator of an estate, it is to be presumed that it previously ascertained the existence of the jurisdictional fact, without which the power could not be legally exercised; but in the language of the Supreme Court of Alabama, in the case of Bean vs Chapman, cited below, *"one of the established exceptions to this rule is where there is no vacancy in an administration, evidence is admissible, even in a collateral proceeding, to show the fact, and in such event the second grant is absolutely void."*

Bean vs. Chapman, 73 Ala. 144.
Colthart vs. Allen, 40 Ala. 155.
Allen vs. Kellam, 69 Ala. 446.
Hooper vs. Scarborough, 57 Ala. 510.
Gray vs. Cruise, 36 Ala. 559.

When a supposed decedent is really alive, does there exist such a "vacancy" as can give the probate court jurisdiction to fill it by the appointment of an administrator? Clearly not.

Duncan vs. Stewart, 25 Ala. 408.
Bean vs. Chapman, 73 Ala. 144.
Scott vs. McNeal, 154 U. S. 34.
Bradley vs. Broughton, 34 Ala. 707.

We see, therefore, that it is well established in Alabama that there can be no valid sale, even at the petition of an alleged administrator, unless the jurisdictional fact of death of the owner actually exists, and that this inquiry is not precluded by the order of sale even upon collateral attack. The contrary has been casually assumed in one or two cases where the question was not involved but always

without reference to the well considered line of authorities cited above, establishing the doctrine for which we contend.

However, we have only to glance at the statutes in regard to the two classes of sales, in order to learn that there is no conflict even between the cases holding that a sale by an alleged guardian may be collaterally attacked on account of defects in proceedings under which the guardian was appointed, and those cases asserting that a sale made by the probate court, upon the petition of an alleged administrator, cannot be collaterally attacked, although the petitioner was not in fact such administrator. The distinctions are manifest.

The statute that provides for sales by the probate court, upon the petition of administrators, reads as follows:

2104. "SALES IN CASE OF INTESTACY.—In cases of intestacy, land may be sold by the administrator for the payment of debts, when the personal estate is insufficient therefor."

Of these proceedings, parties are given due notice, and have their day in court to controvert the existence of the administratorship.

2107. "DAY FIXED FOR TRIAL, APPOINTMENT OF GUARDIAN *AD LITEM*.—The court must appoint a day not less than forty days from the time of making such application for the hearing thereof, and must appoint a proper person, not a petitioner, or of kin to petitioner, as guardian *ad litem* to represent the minors, or persons of unsound mind, if any there be, and must issue a citation to the heirs or devisees of full age, and residing in this State, notifying them of the application, and of the day appointed for hearing the same, which must be served on them ten days before the date appointed for the hearing; and if any such heirs or de-

visees is a married woman, the citation must be served on the husband as well as the wife.

In addition to this, there is a provision for publication as to non-residents.

And the sale is by the court, and not by the administrator.

The administrator usually acts, but the court can appoint any other person as its agent to make the sale and conveyance.

Code, sec. 2124.
Pollard vs. Hanvick, 74 Ala. 337.

On the contrary, the court does not sell the property of an alleged lunatic. It has no power to do so. The statute only empowers it to authorize a designated person to make such a sale, namely, the guardian. If there is no guardian, there is no authority in the court to authorize the sale.

Code, 2434.
Grier's Appeal, 101 Pa. St. 412.
Molton vs. Henderson, 62 Ala. 430.
Eslava vs. Lapretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.

No notice of the petition by the guardian to sell is given to the alleged ward. Why? If the petitioner be the legal guardian, he is the authorized agent of the owner, and thus the owner is the movant. If he is not the legally constituted guardian, he cannot represent the owner in this or any other matter, and thus since the proceedings are by a stranger, and without notice, there is no due process of law and no day in court for the owner.

The difference between the two classes of sales is therefore plain. Upon a petition by an administrator the parties in interest are brought before the court and are therefore bound by the decree. Upon a petition by an alleged

guardian, the ward is given no notice, but is present through the guardian, if duly appointed, and if the alleged guardian has not been duly appointed then the ward has no due process whatsoever and the proceeding is *res inter alias acta* and void. In one the court makes the sale; in the other the legally constituted guardian and none other acts. The court only authorizes him to act, and can authorize none other.

The statute reads as follows:

SALE TO PAY DEBTS, &c., OF PERSONS OF UNSOUND MIND.—The court of probate may authorize the guardian of a person of unsound mind to sell any property of such person, real or personal, when necessary for the payment of debts or liabilities of such person incurred before the inquisition against him, or before the appointment of a guardian, or incurred after such inquisition and the appointment of a guardian, for the maintenance of such person, or for the maintenance of his family.

There is another broad distinction between the appointment of an administrator and the appointment of a guardian; in making the former the probate court acts as a court of general jurisdiction, under powers conferred upon it by the constitution. Its judgment making such an appointment is therefore final except upon a direct appeal.

In the appointment of a guardian, however, the probate court exercises statutory powers which rest upon the existence of certain facts, which must affirmatively appear upon the record to uphold the appointment.

Moody vs. Bibb, 50 Ala. 248.
Pettus vs. McClannaghan, 52 Ala. 58.

It is not therefore difficult to reconcile the decisions holding that a sale by the court, at the petition of an administrator cannot be collaterally attacked, with those holding that a sale by an individual calling himself guardian when he has really never been legally appointed as such, can be collaterally attacked.

Molton vs. Henderson, 62 Ala. 426.
Eslava vs. Lapretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.

It is manifest that to authorize a sale of the property of a living person upon a petition by an alleged guardian of which the owner has no notice, two things must exist; first, there must be a guardian; second, he must obtain authority from the probate court to make the sale.

To hold that the invalidity of the appointment of the guardian could not be set up in the collateral proceedings involving the title to property sold by him would be to hold that the absence of due process of law constitutes a mere irregularity, and does not affect the jurisdiction of the court over the person, and that it could be reached only by a direct appeal within a given time which, in most cases, would expire before the person, whose rights were affected, had learned of the existence of the proceedings.

IV.

THE TRIBUNAL THAT ATTEMPTED TO ADJUDICATE THE LUNACY OF THE PLAINTIFF IN ERROR NEVER HAD JURISDICTION TO APPOINT A GUARDIAN OF HER ESTATE.

Upon questions not involving a federal question, the Supreme Court of the United States will follow the construction -placed upon a state statute by the state court of last resort, but where the question is whether the statute provides due process of law the Supreme Court of the United States will place its own construction upon the statute.

In the case of Rose vs. Himely, 4 Cranch, p. 241, Chief Justice Marshall, in delivering the opinion after reviewing the authorities upon the subject, declared that the Supreme Court would necessarily pass for itself, not only upon the constitution of the court whose jurisdiction was cited to be upheld as due process of law, but the citation of the party in the allegation of the petition, to show whether or not the particular case was brought within the jurisdiction which the court possessed.

In the case of Thompson vs. Whiteman, in 18 Wal. 460, Justice Bradley, reviewing all the authorities upon the subject, quoted, from other authorities, on page 467. He says: "The jurisdiction of any court, exercising authority over a subject, may be inquired into, in every other court when the proceedings in the former court are

relied upon, and brought before the latter by a party claiming the benefit of such proceedings; and the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled had arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

So, too, in the case of Scott vs. McNeal, 154 U. S. 34, Mr. Justice Grey said, on page 46: "No judgment of a court is due process of law if rendered without jurisdiction in the court." The Justice then proceeded to declare that the Supreme Court of the United States would, upon a writ of error from the State court, review its decision upon the question of the jurisdiction of the probate court to appoint an administrator of a decedent's estate.

We maintain, therefore, that the Supreme Court of the United States must review the decision of the Supreme Court of Alabama upon the question as to whether the probate court of Mobile county had jurisdiction of the subject matter so as to authorize it to appoint a guardian for Mrs. Simon, even if she had been accorded a full opportunity to have appeared and defended the matter.

WHEN AND HOW CAN THE ABSENCE OF JURISDICTION BE SHOWN?

If the court that rendered a judgment acts as a court of general jurisdiction, everything is presumed to be within its jurisdiction not affirmatively shown by the record to be without its jurisdiction, while if the court is one of special or limited jurisdiction, nothing will be presumed to be within its jurisdiction which is not so affirmatively shown by the record.

Pettus vs. McClannahan, 52 Ala. 57.

Bottoms & Powell vs. Brewer & Brewer, 54 Ala. 289.

It is true that when a court, even of limited jurisdiction, specifically adjudicates the jurisdictional facts to exist, its judgment cannot be attacked collaterally by evidence *de hors* the record, but where the record of a court, even of general jurisdiction, affirmatively shows the want of jurisdiction, its judgment will be treated as a nullity even in a collateral proceedings.

Hooper vs. Scarborough, 57 Ala., 510.

And in determining, from the record, whether the court had jurisdiction, the inspection is not confined to the decree of the court, but may extend to every part of the record.

Goodwin vs. Sims, 86 Ala., 108.

In the appointment of a guardian for a lunatic, the probate court is one of special or limited jurisdiction, and nothing will be presumed to have been within its jurisdiction that is not so affirmatively shown by the records.

Pettus vs. McClannahan, 52 Ala., 57.
Bottoms & Powell vs. Brewer & Brewer, 54 Ala., 289.

III.

The record does not affirmatively show that the probate court had jurisdiction to appoint Ralph G. Richard guardian of the plaintiff in error; on the contrary, it affirmatively shows that it did not have such jurisdiction.

1st. Because no jury constituted as required by law in such cases was ever drawn, summoned and empanneled.

2nd. Because no sufficient verdict was rendered.

The PROBATE COURT has no jurisdiction as a court to determine or adjudge a person to be a lunatic; that jurisdiction is vested by the statute in a specific tribunal con-

sisting of the judge of probate, and a jury to be drawn and summoned in a specific manner.

Until the matter was regulated by statute, the probate court had no jurisdiction to adjudicate the question of sanity *vel non;* that jurisdiction was vested in the Chancery Court.

11 A. & E. Ency. of Law, p. 114.

If the probate court now has such jurisdiction the statuate law of this state must be looked to for its source and extent.

By the act of March 12th, 1803, Toulmin's Digest, pp. 384-5, Sec. 51, the Orphans' Court was authorized to issue a writ to the sheriff of the county "to summon twelve good, discreet and lawful men of the county *and neighborhood* of the residence of such person" (i. e. of the supposed lunatic) "to make inquisition thereto on oath; and if the person said to be an idiot, lunatic, or *non compos mentis,* shall be adjudged *by such* inquisition" (or the major part of them) "to be incapable of taking care of himself or herself, and they shall certify the same under their hands and seals to the Orphans' Court, the court shall assign some suitable person or persons to be guardian or guardians."

The law read "That the Orphans' Court are hereby authorized, and empowered, within their respective counties on request made by the friends or relations of any idiot, lunatic, or person *non compos mentis* or by the overseer of the poor for the district in which such idiot, lunatic, or person *non compos mentis* resides or is an inhabitant, by writ, to direct the sheriff of the said county to summon twelve good, discreet, and lawful men of the county and neighborhood of the residence of such person to make inquisition thereto, on oath; and if the person said to be an idiot, lunatic, or *non compos mentis,* shall be adjudged by such inquisition, (or the major part of them,) to be incapable of taking care of him or herself, and they shall certify the

same under their hands and seals, to the Orphans' Court, the said court shall assign some suitable person or persons to be the guardian or guardians."

This statute conferred jurisdiction upon the Orphans' Court to order the sheriff to hold the inquisition, but did not confer jurisdiction upon the court itself to hold it; it did not even authorize the judge of probate to order the inquisition to be held in the presence of the judge of probate.

Eslava vs. Lapretre, 21 Ala., 523.

Under the act of 1803 four things are clear:

1st. That it conferred no jurisdiction upon the probate court to adjudicate the question of lunacy.

2d. That it constituted a special statutory tribunal consisting of the sheriff and twelve jurors, to adjudicate such fact.

3d. That it required that the jurors should be both of the county *and neighborhood* of the residence of the alleged lunatic.

4th. That it gave the Orphans' Court jurisdiction to appoint a guardian upon the certificate by the special tribunal of its finding of lunacy alone.

It is apparent that unless conferred by some amendment to this act, the probate court has no jurisdiction to adjudicate lunacy, nor has it jurisdiction to issue a writ to the sheriff to summon a jury other than of the county *and neighborhood* of the residence of the alleged lunatic to hold such inquest.

In 1819, Clay's Ala. Digest, p. 302, the legislature authorized the Orphans' Court to appoint guardians for lunatics within their jurisdiction, regulating the security to be given by the guardians, and their responsibility, but left the method of adjudicating the question of lunacy *vel non*, unaltered. The law read as follows:

"It shall be lawful for every orphans' court within this

State, where any idiots or lunatics shall be within the jurisdiction thereof, to appoint them, or either of them, a guardian, taking bond with approved security, for the faithful administration of the trust reposed in the same manner as bonds are taken from the guardians of orphans; and such guardian, when so appointed, shall continue during the pleasure of the court, and shall have the same power, to all intents, constructions, and purposes, and shall be subject to the same rules, orders, and restrictions, as guardians of orphans are; such lunacy to be ascertained by the inquisition of a jury, by virtue of a writ to be issued by the court, to the sheriff of the county for that purpose."

In 1821, Toulmin's Digest, p. 385, the legislature modified the provisions of the act of 1803 in two particulars, only.

1st. It provided that the inquisition might be ordered either in vacation or in open court.

2d. It provided that *on sufficient cause shown* the *judge* may order the inquisition to be had before him; this act expressly provided that "in other respects the same proceedings shall be had thereon as heretofore," reads as follows:

"That inquisitions as to idiots, lunatics, or persons *non compos mentis*, may be ordered in vacation, or in open court, and made returnable as process of citation on sufficient cause shown, the judge may order any such inquisition to be had before him; in other respects, the same proceedings shall be had thereon as heretofore."

It is clear that down to this point the only jurisdiction conferred upon the court was, *first*, to order a writ to issue to the sheriff to summon the jury and hold the inquisition; *second*, to order such inquisition held before the judge of probate, upon sufficient cause being shown therefor, and *third*, to appoint a guardian *if and when*, the inquisition should adjudge the alleged lunatic to be incapable of taking care of himself, and certify the same under their hands

and seals to the orphans' court.

That this statute did not confer jurisdiction upon the orphans' court to adjudicate the question of lunacy, is as clear as language can make it. It is also clear that down to this point the only writ that the court was authorized to issue, was a writ addressed to the sheriff, commanding him to summon a jury of twelve men of the county *and neighborhood* of the residence of the alleged lunatic, and that the only power the sheriff had was to summon *such* a jury, and that the inquest could only be held by a jury *so* summoned.

By the acts of February 5th and 9th, 1850, (Acts of 1849, pp. 43 and 47) certain commissioners were appointed to prepare a code of laws without being strictly confined to the codification of the laws as they then existed. This codification resulted in the code of 1852, and the law was there modified in the following particulars only:

1st. By authorizing the court to appoint a day and issue a writ only upon the petition of a relation or friend of the alleged lunatic.

2d. By requiring the petition to set forth the facts, name, sex, age and residence of the alleged lunatic.

3d. By requiring the petition to be verified by an affidavit that the petitioner believes the facts therein stated to be true.

4th. Upon the filing of such a petition, it authorizes the judge of *probate* to appoint a day for the hearing thereof.

5th. It authorizes the judge of probate, instead of the county court, to issue the writ to summon a jury *of the neighborhood.*

6th. It further authorizes the judge of probate to issue a writ to the sheriff to take the alleged insane person, or idiot, and, if consistent with his health or safety, have him present at the place of trial.

7th. It requires that the verdict shall ascertain that *the facts alleged* in the petition are true, *and* that such person is an idiot, lunatic or *non compos mentis*, and provides that, upon the rendition of such a verdict, the court must cause the petition, and all proceedings thereon to be recorded, whereas, under the original act, the judgment of the inquisition need only have ascertained that the alleged lunatic was incapable of taking care of himself or herself.

The provisions of the Code of 1852 read as follows:

"2750. Upon the petition of any of the relations or friends of any person alleged to be an idiot, lunatic, or person *non compos mentis*, setting forth the facts and name, sex, age, and residence, of such alleged idiot or lunatic, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the judge of probate of the county in which such alleged lunatic, idiot, or person *non compos mentis* resides, must appoint a day not more than ten days from the presentment of such petition, for the hearing thereof."

"2751. He must also issue a writ, directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof, and also issue subpœnas for witnesses as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff, to take the alleged insane person or idiot, and if consistent with his health or safety, have him present at the place of trial."

"2753. If the jury find by their verdict that the facts alleged in the petition are true, and that such person is an idiot, lunatic, or *non compos mentis*, the court must cause the petition, and all the proceedings thereon, to be recorded, and appoint a suitable person guardian to such idiot, lunatic, or *non compos mentis*, requiring him to execute bond as other guardians."

It will be noted that no change is made, intimating in the remotest degree an intention to transfer the jurisdiction to declare a person a lunatic, from the special tribunal consisting, first, of the sheriff and a jury, and later, either of the sheriff and jury, or of the judge of probate and jury, to the probate court; on the contrary, every change made, limits, instead of enlarging, the powers of the court, limits the right to an inquest by requiring that it shall only be upon a petition *of a relative, or friend, stating the facts, and the name, age, and residence of the alleged lunatic,* and that the petition shall be sworn to, and it requires that the verdict ascertain the facts, and that the person is an idiot, lunatic, or *non mentis compos* before it authorizes the court to appoint a guardian for her.

The law, as declared in Eslava vs. Lepretre, 21 Ala., 522, remained substantially unchanged by the code of 1852, except that the hearing by the jury is always had before the judge of probate court.

Laughinghouse vs. Laughinghouse, 38 Ala., 257.

There has been no act of the legislature making any amendment of these provisions or of the code of 1852, and they are carried forward through the successive codes, in substantially the same language, until the present day.

It is apparent, therefore,

1st. That the probate court has never had jurisdiction to declare a person a lunatic.

2d. That the jury the court is required to summon, is not a jury to try an issue *in the probate court,* but one summoned to constitute a special statutory tribunal to try and determine, under the direction of the judge of probate, the question of lunacy.

3d. That the probate court has no jurisdiction to appoint a guardian for an alleged lunatic, until such statutory tribunal has been formed, and has rendered its statutory verdict.

These conclusions were clear under the provisions of the code of 1852, but have been emphasized in the code of 1886. Sec. 2016 of the code of 1852, sec. 2414 of the code of 1867, and sec. 2753 of the code of 1876, all provide: "The judge of probate must also appoint guardians for persons of unsound mind who may reside in his county and be possessed of any estate real or personal," but the secs. 2390 and 2391, of the code of 1886, in force when the proceedings in question were had, (hereinbefore set out on page 10), as if anticipating that the contention made in this case by defendant in error might arise, and the argument be made that the jurisdiction to appoint a guardian of a lunatic was not dependent upon a strict observance of the statutory proceedings prescribed for the determination of the question of lunacy, emphatically declared that it should be so dependent. Section 2390 provides that the probate court shall appoint guardians *under the limitations and in the mode hereinafter* prescribed, and sec. 2391 provides that a "guardian for a person alleged to be of unsound mind, residing in the county, *must not be appointed until an inquisition has been had and taken, as hereinafter directed.*"

Even if the probate court had expressly adjudicated all of the facts necessary to give it jurisdiction to appoint Ralph G. Richard as guardian of plaintiff in error, such adjudication would not be binding, for the reason that the court has, as we have shown, no power to make the adjudication.

Goodwin vs. Sims, 86 Ala., 108.

The court did not, however, undertake to so adjudicate; it merely appointed a guardian, and the appointment must be held void, unless the record affirmatively shows that the court had jurisdiction to make it.

Moody vs. Bibb, 50 Ala., 248.
Pettus vs. McClannahan, 52 Ala., 58.

The record really shows affirmatively that the court did not have jurisdiction to make the appointment.

THE ALLEGATIONS OF THE PETITION FOR AN INQUISITION OF LUNACY WERE INSUFFICIENT TO CONFER JURISDICTION TO APPOINT A GUARDIAN.

The statute authorizing such an inquisition reads as follows: "2390. APPOINTMENT.—The court of probate has authority, and it is a duty to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the state, having within the county property requiring the care of a guardian under the limitations and in the mode hereinafter prescribed."

The petition for the inquisition alleged that the plaintiff in error resided in Mobile county, but did not allege that she had any property, real or personal, and was therefore insufficient to confer jurisdiction to appoint a guardian.

We respectfully refer to the dissenting opinion of Mr. Justice Head in this case, which will be found on page 49 of the record, and adopt the language of that opinion as our argument upon this proposition.

NO WRIT WAS ISSUED TO THE SHERIFF COMMANDING HIM TO SUMMON TWELVE DISINTERESTED PERSONS OF THE NEIGHBORHOOD FOR THE TRIAL OF THE INQUISITION.

In this case, the record affirmatively shows that the judge of probate arbitrarily selected twenty-four persons, some of whom resided in the city of Mobile, and some outside of the city, but in the county, and four of whom were non-residents. The record does not show that they were either *disinterested,* or *of the neighborhood* of the residence

of the plaintiff in error. It is submitted that these facts alone show that no jury, authorized to try the writ, was ever summoned.

It is claimed by the defendant in error that the special jury law for Mobile county, modifies section 2393, and that the jury was properly drawn, under the law; but this is a mistake. The section of the special jury law, supposed to have that effect, is sec. 12 (Acts of 1882-3, p. 509) which provides that "Whenever a jury is required to try an issue *in the probate court* the judge of said court shall, in the presence of three other jury commissioners, draw from the "circuit court jury box" twenty-four names, which shall be recorded as they are drawn," but we have seen that this was not "an issue in the probate court;" it was a trial by a statutory tribunal, to be presided over by the judge of the probate court, but was not an issue tried in that court, and the special jury law for Mobile county, therefore, is not applicable; but if the special jury law for Mobile was applicable, still, the record does not show that the jury was drawn according thereto; it does not show that the jurors were drawn from the jury box of the circuit court, nor that they were drawn by the judge of probate in the presence of those commissioners.

It is further claimed by the defendant in error that even if the writ issued by the sheriff be controlled by section 2393 of the code, and be not affected by the special jury law for Mobile county, the writ need not require the jury to be summoned from the neighborhood of the alleged lunatic; that the terms "neighborhood" is synonymous with the term "county," and that a jury summoned from the county, complies with the requirement. Such is certainly not the ordinary acceptation of the term neighborhood. All jurors are supposed to be drawn from the county in which the trial is had, and to give the word "neighborhood" such an interpretation is to entirely deprive it of any mean-

ing whatever, as the jury would necessarily be empannelled from the county without any special provision. It may be that a jury summoned from the neighborhood of the alleged lunatic's residence, necessarily includes only persons, residing within the same county, for the sheriff has no authority to summon a person residing in another county; it does not, however, follow that every person residing in the same county is a resident of the same neighborhood, and the history of the act shows that the word "neighborhood" was not intended as a mere synonym for the term "county," for, by the Act of 1803, where the term was first introduced into the statute it was expressly declared that the sheriff should summon "twelve good, discreet and lawful men *of the county and neighborhood* of the residence of such person." As the sheriff could summon only men of the county, that portion of the statute was deemed superfluous, and was omitted by subsequent codifiers, but the meaning of the term neighborhood, as originally introduced into the statute, has not been altered by any subsequent legislation, or codification, and the qualification of jurors is retained in the statute as one of the many provisions found there for the protection of the unfortunate class supposed to be *non compos*.

The provisions of the statute that the jury shall be composed of persons both *disinterested*, and *of the neighborhood*, is plain; it was intended to protect the alleged lunatic against the designing, by having a jury that are both disinterested, and who, by their residence, are likely to know something of the alleged lunatic, and his or her surroundings, and as to whether the effort to have him, or her, adjudged insane, is really in his, or her, interest, or part of a scheme on the part of some designing person to get charge of the estate of such person; the provision that the alleged lunatic shall be tried by her neighbors, is but a complement to the provision that requires the petition to be filed by a friend or relative.

THE WRIT DID NOT DIRECT THE SHERIFF TO SUMMON A JURY FOR THE TRIAL OF THE ALLEGATIONS OF THE PETITION.

The writ simply required the sheriff to summon a jury "to make inquest and try whether Jetty Simon is of unsound mind and incapable from such cause of governing herself and managing her affairs." The mere fact that the writ addressed to the sheriff did not properly recite the purpose for which the jury was summoned, would probably not have rendered the proceedings void, but the recitations of the summons that the jury was summoned to try whether the plaintiff in error was of unsound mind, &c., in connection with the fact that their verdict was confined to the ascertainment of this fact, raises the presumption, in the absence of any recitation in the record to the contrary, that the allegations of the petition, although jurisdictional, were not submitted to the jury for adjudication.

IT DOES NOT AFFIRMATIVELY APPEAR FROM THE RECORD THAT IT WAS EVER ADJUDICATED THAT THE PETITION FOR A WRIT OF LUNACY WAS FILED BY A FRIEND OR RELATIVE, NOR DOES IT AFFIRMATIVELY APPEAR THAT THE PLAINTIFF IN ERROR WAS OVER THE AGE OF TWENTY-ONE YEARS, OR A RESIDENT OF MOBILE COUNTY.

Each of these matters was jurisdictional, and every jurisdictional fact must affirmatively appear upon the record, in order to uphold the validity of the proceedings.

Pettus v. McClannahan, 52 Ala. 58.

We have seen that there is no jurisdiction to institute an inquest of lunacy, except upon a petition by a friend or relative, stating the facts, the name, age and residence of the alleged lunatic, and the question is, how is it to be ad-

judicated whether the petition is led by a friend or relative, or whether the alleged lunatic is of age, and a resident of the county? The statute clearly provides for the ascertainment of all these facts; Sec. 2392, set out in Part II of this brief, requires that all these facts be alleged in the petition; Section 2393 provides that a jury shall be summoned for the trial thereof; Section 2394 requires that the jury shall be sworn "well and truly to make inquisition of *the facts alleged* in the petition *and a* true verdict render according to the evidence;" while Section 2395 provides that "if the jury find by their verdict that the *facts alleged in this petition* are true *and that such person is of unsound mind* the court must cause the petition and all of the proceedings thereon to be recorded, and appoint a suitable guardian for such person." It thus clearly appears that the ascertainment of *all these jurisdictional facts* is confided to the jury, and *must be* affirmatively found by them before the appointment of a guardian can be upheld as valid; but it is suggested by defendant in error that the finding of these facts is confided to the court, because the court can only issue its writ where the facts exist, and yet the law necessarily requires the writ to issue before the jury is summoned.

The argument is not sound; the filing of a petition gives the court jurisdiction to issue the writ to institute the necessary inquiry as to the truth or falsity of the allegations, but not to adjudicate them; to say that by the issuance of the writ, the court adjudicated the truth of the allegations of the petition, would be to first adjudicate material elements of the controversy, and then constitute a tribunal to try what had already been determined; it would be to give a party notice to appear after the case was decided. As well might it be said that the issuance of a writ of attachment, or detinue, is an adjudication of the truth of the allegations of the affidavit.

FOR THE ASCERTAINMENT OF THE SEVERAL JURISDICTIONAL ALLEGATIONS OF THE PETITION, WE MUST LOOK TO THE VERDICT OF THE JURY.

It is to the jury alone, that the determination of these matters is confided, and it is only upon its ascertainment of them that the probate court is authorized to grant letters of guardianship.

Originally the writ to the sheriff to summon an inquest of lunacy issued, without a petition, upon the mere request of a friend or relation of the alleged lunatic, and the verdict was only required to ascertain that the alleged lunatic was incapable of taking care of himself or herself, and upon such verdict a guardian was appointed.

Acts of 1803, Toulmin's Digest, pp. 384-5, sec. 51.

But, when by the Code of 1852, it was required that the petition be made by a friend or relative, and that it should set forth the facts, name, age and residence of the alleged lunatic, it was further required that the verdict should ascertain that the *facts alleged in the petition* are true *and* that such a person is a lunatic. It will thus be seen that a verdict ascertaining *only* that the alleged lunatic is *non compos* was formerly sufficient, and that the statute was expressly changed so as to make it insufficient.

Code of 1852, sections 2750-53.

The verdict in this case only found that the plaintiff in error was *non compos*, and did not find the other facts alleged in the petition to be true, and as the court was only authorized to appoint a guardian upon a verdict ascertaining such facts to be true, its appointment of Ralph G. Richard was necessarily without jurisdiction, and absolutely void.

Eslava vs. Lepretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.
Molton vs. Henderson, 62 Ala. 430.

That a verdict ascertaining the facts alleged in the petition to be true is jurisdictional, and that the appointment of a guardian without such a verdict is absolutely void, has been adjudicated in several States.

Guthrie vs. Guthrie, 51 N. W. Rep. 13.
State vs. Billings, 57 N. W. Rep. 206.
Menefee vs. Ends, 30 S. W. Rep. 882.

As we have already suggested, in our opinion the probate court had no right nor power to render any decree whatever in this matter. It is the verdict of the jury, and not the judgment of the court, which authorizes the appointment of the guardian, under our statute; but be this as it may, the court itself, in this case, has not undertaken to try and determine the other issues in the case, but has undertaken to adjudicate simply *"that the petition and all of the proceedings thereon, together with the verdict of the jury, declaring the said Jetty Simon a lunatic, be recorded,"* and the other jurisdictional facts stand today, without having been ascertained or declared either by the court or by the jury. The reasons which have prompted our legislature to provide that a guardian shall be appointed only upon the finding of the jury not only that the person is of unsound mind, but further that the petitioner is a relative, or friend, together with the name, age, sex and residence of the alleged lunatic be ascertained by the jury, appear to us to be manifest; but be this as it may, the legislature has so specifically provided.

As Richard's appointment was void, and there was, therefore, no guardian, the subsequent sale by him was necessarily void and defendant in error obtained no title,

and the general charge for the plaintiff in error should have been given.

Molton vs. Henderson, *supra.*

TO RECAPITULATE.

The statutory process was never issued—Mrs. Simon was actually restrained from appearance, and there was, therefore, no due process of law.

The jury summoned was not of the character prescribed either by the code or the special jury law of Mobile county. Nor was it summoned to try the jurisdictional facts, but only a part thereof.

Nor did either the jury or the court undertake to ascertain or adjudge the truth of the allegations of the petition, but ascertained only one of the several essential allegations.

Respectfully submitted,

Gregory L. Smith

Harry T. Smith

Attorneys for Plaintiff in Error

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 191.

JETTY SIMON, PLAINTIFF IN ERROR,

vs.

JOHN N. CRAFT.

Supplemental Brief for the Plaintiff in Error.

Since filing the brief for the plaintiff in error, a few authorities not therein cited have come to our attention, and we have examined those authorities which are cited by the defendant in error to uphold the proposition that at common law no notice to the alleged lunatic was necessary in the proceedings in which his insanity was to be adjudged and his property to be taken from him and passed over to a guardian. We have also examined the American authorities cited by the defendant in error to uphold the assertion that no notice is necessary in an inquisition of lunacy as it exists in several of the States. We desire, therefore, to cite the additional authorities referred to and

to submit a brief abstract of the authorities cited by the defendant in error.

The defendant in error contends that a judgment of the court cannot be collaterally attacked, even for a want of service upon the defendant or for jurisdiction of the court over the subject-matter. Upon this question we desire to add to the authorities upon brief the case of Kilbourne *versus* Thompson, 103 U. S., 197, and also the case of The State Bank of Ohio *versus* Knoop, 16 Howard, 391, where it is held that this court will never be bound by the decision it is reviewing, or, as is said in The Louisville and Nashville Railroad Co. *versus* Palmer, 109 U. S., 256, by any other State decision which does not announce a well-settled construction by the State courts. These authorities are material, in view of the fact that the present decision of the supreme court of Alabama is a departure from all former decisions upon the same subject, as we have attempted to show in our brief.

On page 34*b* of our brief we have said that the doctrine that the finding of a court upon *quasi* jurisdictional questions could not be overturned upon a collateral attack, even if established, seemed to us to have no application to the question of personal service, for the apparent reason that the defendant has no opportunity of being heard upon this question where he is not served, as he has in regard to other jurisdictional questions which are litigated after he is before the court. Upon this question we desire to cite the case of Noble *versus* Union River Logging Co., 147 U. S., 173.

As was anticipated in preparing our original brief on this subject, the defendant in error, omitting all mention of the

statute of Edward the 6th, which is cited upon our brief, and which established the absolute right of the alleged lunatic to notice and opportunity to be heard, has cited a line of English authorities prior to this statute holding that there need be no notice to the alleged lunatic of the issuance of the inquisition. These authorities, however, themselves explain that this is not because the alleged lunatic has no right to be heard, but only because the issuance of the inquisition is only in the nature of the issuance and service of the summons, affording the alleged lunatic an absolute right to be heard by means of what was called the traverse. To illustrate, the defendant in error on page 11 of this brief quotes from the case of *Ex parte* Ward, 6 Ves., 579, the following fractional sentence:

"The law has provided that no person shall be put in such a position, deprived of his liberty and the administration of his affairs, until the fact is ascertained by a proceeding that I must admit to be *ex parte*."

By turning to the authority just above cited from, however, it will be found that the period with which the quotation is ended, is that of the brief-maker; that in the authority itself it is a colon, the sentence in fact continuing as follows:

"a proceedings which the law supposes may collect mistake: and therefore has given a positive right to certain persons to traverse the inquisition." Citing St. 2d Edward VI, c. 8, s. 6, which will be found copied in our brief, p. 29.

We have therefore determined to submit the following abstract of the defendant's authorities:

Shelford on Lunatics, Idiots, &c., second edition, page 157, section 6, chapter 6:

"Where the jury under the commission has determined that the object of it is of unsound mind, the consequence is that the person who has authority to issue the commission is bound to make a grant of the custody of the person and estate; yet it is clear that a person found by the inquisition to be of unsound mind has an absolute right to require the further proceeding of a traverse. No grant, therefore, of the custody could formerly be made, pending the traverse; and the court, if there was no fund in its hands, could not make an order as to the costs of the commission.

"When the determination of the party to traverse is known, the Lord Chancellor is bound to put the soundness of the verdict in that course of inquiry; in the interval, everything with regard to the dominion over the property or person was formerly stopped, and the consequence was that it was impossible to make any order about costs," &c.

In the appendix to Shelford on Lunatics I find the following statute:

2 & 3 Edw. 6, A. D. 1548, cap. VIII, sect. 6:

"If any person be or shall be untruly, founden lunatic, idiot or dead: Be it enacted by the authority aforesaid, that every person and persons grieved, or to be grieved, by any such office or inquisition, shall and may have his or their traverse to the same immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse, upon untrue inquisitions or office founden; any law, usage, or custom to the contrary in anywise notwithstanding."

On page 156 it is stated that the statutes of the 8 and 18 Henry 6 direct a month to elapse between the retnrn of the

inquisition and the grant of the custody of the estate, that the party may come in and tender a traverse; and it seems that if the grant is made before the expiration of the month it is void. In case a traverse be tendered, the grant of the custody will generally be suspended, at least until further orders; for, if upon the trial of the traverse the party be found *compos mentis*, the property cannot be taken; and therefore, where leave to traverse an inquisition has been granted, the court refused to confirm the master's report approving of the committees.

Shelford on Idiots, Lunatics, &c., second edition, page 121, section 4, chapter 4:

In describing the proceedings had when the master in lunacy and jury have assembled to execute the commission, it is said:

"The lunatic ought also to be examined by the master in lunacy and a jury, all other parties being absent; the alleged lunatic has also a right to insist on such examination and to be present at the execution of the commission."

On page 125, same chapter, &c., it is stated:

"The master in lunacy, or commissioners and jury have a right to inspect and examine the lunatic, and it is believed most commonly do so."

On page 127, same chapter, &c., it is said:

"A commission may be directed against a *non compos* abroad, and the inquisition shall be taken, not where he last resided, but where his mansion-house or other property is situated."

The reason given on page 128 is that—

"If no inquiry can be made in this country, both the

person and the estate would be in a very unfortunate case, and also the King as to his prerogative."

"If he be beyond the sea and is of sound mind himself, the laying hold of his lands is notice to him that such proceedings are against him, and he may come and appear," &c.

On page 130, of same chapter, &c., it is again stated:

"The supposed lunatic himself has a right to be present at the execution of the commission."

But on page 131, same chapter, &c., it is said:

"In ordinary cases of the execution of inquests of office, inasmuch as such proceedings are *ex parte* and not conclusive, notice is not given of the execution of the commission to the party who will be affected by it; but if sufficient reason for such notice is made out on application to the court, an order may be obtained that reasonable notice be given to the party requiring it."

I.

In re Cook, 6 N. Y. Sup., 720, br. 10, did not involve or decide a question as to notice to the lunatic, but involved only the necessity of notice to a grandson and others having a secondary interest in the estate.

II.

Willis *vs.* Willis, 12 Pa. St., 161, is not in point. There the holding was not that notice was unnecessary, but that in the absence of proof and where the record was silent it would be presumed that notice had been given. The question as to whether notice was necessary to the validity of the statute under the XIV amendment was not hinted at.

III.

In re Wendell, 1 Johnson Chancery, 600, the court not only did not deny the necessity for notice, but expressly directed the trial by jury upon issue to be formed between the alleged lunatic and the petitioner. The defendant in that case was actually in court and represented by counsel.

IV.

In re John M. B. Child, 16 N. J. Equity, 498, the question of the necessity for notice and opportunity to be present was neither raised nor discussed. The court asserted—and even this without reasoning or the citation of authority—that it was not absolutely necessary that the alleged lunatic should actually be before the jury. But there is a great difference between saying that an appearance by a defendant is not necessary to the validity of the judgment, and saying that an opportunity to appear need not be accorded him.

V.

In re Daniel Perkins, 2 Johnson's Chancery, 124, does assert that a commission of lunacy may issue against a person abroad, but not that it may be tried and a judgment rendered which will deprive him of his life, liberty, and property without notice, or after denying him the opportunity to be heard.

This is most forcibly pointed out by case next commented upon.

VI.

Re Petit, 2 Paige, 174: This case, like that above mentioned, held only that proceeding would lie against a non-resident having property in the county. In this case, however, it was pertinently said: "The commissioners must give her due notice of the time and place of executing the commission, that she may attend if she thinks proper to do so."

VII.

So in the case of *In re* Ganse, 9 Paige, 416, it is held as in last two cases, but also that notice to alleged lunatic is necessary.

VIII.

Southern Tier Mas. & C. *vs.* Laudenbach, 5 N. Y. Sup., 901, does assert that notice is unnecessary, but the reason assigned for the holding entitles the opinion to no great weight. Here it is: "The next objection is that there was no notice to Laudenbach of the execution of the commission. Whether or not notice shall be required in proceedings *in rem* depends upon the statute. No question of constitutional power is involved. The Fifth Amendment to the Constitution of the United States has nothing to do with it. That amendment restricts the power of the General Government, but has no effect upon the States."

IX.

Smith *vs.* Barnham, 1 Aikens, 84, decides only that, in absence of proof to contrary, notice will be presumed from silence of record—not that it was unnecessary.

X.

Chavennes *vs.* Priestly, 80 Iowa, 316; S. C., 45 N. W., 768: This is the only case which we have seen where it is squarely held that notice is unnecessary, and that constitutional guaranty has no application to the case. It is asserted, not argued nor supported by authority. The reason given is that notice would not avail an insane man. It will be observed that this assumes the very point at issue.

XI.

Ex parte Hall, 7 Ves., Jr., 261: Upon what theory this case is cited I am lost to know. Notice was here directed, but the question as to whether it was of right was not discussed.

XII.

Ex parte Southcote, 2 Ves., Sr., 401: It is true that in this case it is held that a proceeding of lunacy may be had against a non-resident lunatic owning an estate. It is also true, however, that in this case the chancellor declared:

1st. That the issuance of commission determined not whether the party was a lunatic, but only whether that subject should be inquired into.

2d. That the proceedings against a non-resident would not be conclusive, for "the laying hold of his lands is notice to him that such proceedings are against him, and he may come and appear, or any person opposing the commission on his behalf will be heard."

XIII.

In re Deamer, 6 Wend., 497: Cited to show that an inquisition of lunacy is a proceeding *in rem*.

See our Brief, p. 21.

XIV.

Gregnon *vs.* Astor, 2 How., 319: This is cited as holding that a lunacy proceeding cannot be collaterally attacked. It does not mention such a proceeding. It holds only that an administrator's sale cannot be collaterally attacked, except on ground that there was no vacancy. (See Scott *vs.* McNeal.) It shows the distinction between jurisdictional and quasi-jurisdictional facts. (See Mobile and Union River Logging R. R., 147 U. S., 173.) It shows that an administrator represents estate, which is the owner of the property, and there is therefore *notice*, and it distinguishes between courts of general and courts of special jurisdiction.

XV.

Rogers *vs.* Walker, 6 Penn. St., 371: Ejectment by guardian. Defendant objected to inquisition as showing title, because no notice to lunatic. Court held that it was *prima facie* evidence against *third persons*, and that it bound the lunatic because she did appear and *traverse* and try the issue. Question here presented not discussed.

XVI.

King *vs.* Daly, 1 Ves., Sr., 269, explains all of the common-law cases holding that notice of the application for the inquisition was unnecessary, because an inquisition is only an indictment, and that lunatic has the right to traverse.

XVII.

Bennett *vs.* Hunter, 9 Wallace, 376, does not seem to us to be in point. The holding there was that failure to pay tax works a forfeiture to State which could be declared by legislature. The question of taxation has always been an exception, nor would this prevent the necessity for proof that taxes were not paid. It is not conclusive upon the party unless supported by the fact upon collateral attack.

XVIII.

King *vs.* Mullins, 171 U. S., 416 *et seq.*: Held only that nonpayment of taxes authorized absolute forfeiture without any proceedings whatever, so as to transfer by its own force the title. This is all right, but it is not the equivalent of holding that the declaration of such a forfeiture would preclude an inquiry into the question as to whether the facts working such forfeiture ever in fact occurred.

XIX.

Hutts *vs.* Hutts, 62 Ind. Reports, p. 214: The holding in this case was not that notice was unnecessary, but only that, as against strangers to the record, notice would be presumed

to have been given in the absence of any proof to the contrary and where the record was silent.

XX.

Studabaker *et al. vs.* Marphy, vol. 7, Ind. App., p. 368:

The question of the necessity of notice was not raised in this case. The alleged lunatic in fact appeared and contested the petition, and the lunatic appealed. The point was made that the proceedings were *ex parte*. Exactly what this could mean in a matter which was in fact litigated by both parties, we do not understand, but be this as it may, the court held that the lunatic had the right to appeal.

XXI.

Nailor's Children *vs.* Nailor and Wife *et al.*, 4 Dana's Reports, p. 339 (Ky.):

A short quotation from this opinion will do:

"A clear case should be made out, upon the inquisition, of *non compos mentis*, or the mental incapacity to manage his own concerns.

"And such a case is made out, with the guards which the law has thrown around the unfortunate individual, of a right to have the inquisition found by his peers, who will ever lean towards liberty of a citizen, and also, the right to traverse the inquisition before the chancellor, if found against him, there can be no danger in its exercise, but protection and security to the helpless."

XXII.

Dutcher *vs.* Hill, 29 Mo. Reports, p. 272:

In this case the court said:

"The statute is silent on the subject of notice to the lunatic; but directs that in proceedings under it, the county court may, in its discretion, cause the person alleged to be of unsound mind to be brought before the court. Whether this provision is a substitute for the notice and was designed to leave it to the discretion of the court whether the alleged lunatic should have notice and should be present at the making of the inquisition we will not determine, as on any construction of the statute we are of opinion it should appear from the proceeding why the notice was not given, or the attendance of the person of unsound mind required.

"On general principles persons should have notice of proceedings in courts by which their rights are to be effected, otherwise those proceedings will not bind them.

"Judgments rendered without notice are not binding."

XXIII.

Kimball *vs.* Fish, 39 N. H. Reports, 110: In this case the holding is simply to the effect that the failure to give notice to the alleged lunatic was a matter which could be waived by him, and that it was waived by him in this particular case by his filing a petition to have the other party appointed as his guardian.

XXIV.

Holman *vs.* Manning and Trs., 65 N. H. Reports, p. 228:

The question here presented was whether an amendment of complaint could be made, and the court held that the

parties being before the court that the question as to what pleadings could be had did not involve the question of due process of law.

"The opinion begins with the statement: 'Due process of law generally implies and includes regular allegations, opportunity to answer, and a trial according to some settled course of proceedings' (citing authorities)."

XXV.

Milley Medlock *et al. vs.* John Cogburn *et al.*, 1 Rich. Eq., p. 477 (S. C.):

This is a bill filed to enjoin John Cogburn from acting as committee of complainant, who was found to be of unsound mind by an inquisition taken under a writ in the nature of the writ *de lunatico inquirendo.*

The grounds for relief alleged by the bill are, first, that the complainant Milley Medlock had not notice of the application to the court and of inquisition of which she was found of unsound mind, and, secondly, that she is not in fact of unsound mind.

The opinion in substance holds as follows, viz: That where a person in interest is dissatisfied with the finding of the jury the course is to traverse at common law.

"The right to traverse is referred by the English cases to the statute 2d and 3d Edw. 6, c. 8, 56, providing if any person be or shall be untruly founded lunatic, etc., be it enacted that every person or persons grieved or to be grieved by any such office or inquisition, shall or may hear his or their traverse to the same, immediate, or after at his pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden."

It is then declared that this became part of the law of South Carolina.

"As to the first, I think from the authorities that notice was not necessary. In *Ex parte* Southcote it was held that the presence of the party was not necessary. In that case he was in a foreign country, and plainly it was not intended that the notice should be given him. This may be inferred from *Ex parte* Hall, 7 Ves., 261, in which, under the circumstances of the case, Lord Eldon directed that the party should have notice, and quashed the inquisition for want of it.

In the King *vs.* Daly, 1 Ves., Sr., 269, which was a case of inquisition of escheat, it was said, in all cases of *inquest*, not to be the general rule that notice should be given; yet when a party desires notice he is entitled to it.

It was his privilege to be present if he thought proper. So it is said the jury may require the presence of a party if they think proper, but they are not bound to do it." * * *

Having cited the case of *Ex parte* Hall, 7 Ves., 261, he says:

"As said by the chancellor in the last case, the traverse under the statute is matter of right at law and perhaps no order of this court would be necessary for this purpose."

Respectfully submitted.

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Plaintiff in Error.

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No. 191.

Brief of Pillans & Bestor for D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 191.

JETTA SIMON, Plaintiff in Error,

vs.

JOHN N. CRAFT, Defendant in Error.

BRIEF OF H. PILLANS AND D. P. BESTOR,

FOR DEFENDANT IN ERROR.

(17,621.)

2211

Supreme Court of the United States.

OCTOBER TERM, 1900.

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JETTA SIMON, Plaintiff in Error,

vs.

JOHN N. CRAFT, Defendant in Error.

BRIEF OF H. PILLANS AND D. P. BESTOR,

FOR DEFENDANT IN ERROR.

This was an action of ejectment brought by Jetta Simon against John N. Craft in the Circuit Court of Mobile to recover a lot of land in the city of Mobile, Alabama. The cause was tried on an agreed statement of facts.

Jetta Simon entered into possession of this real estate on May 23d, 1872, under deed, and continued in exclusive and adverse possession until May 6th, 1889.

Henry Simon obtained title to the lot under a deed executed to him by Ralph G. Richard, as the Guardian of Jetta Simon, a lunatic, which deed was executed on May 11th, 1889.

John N. Craft entered into such possession under a

purchase from and deed executed to him on May 17th, 1889, by Henry Simon and wife, for the cousideration of four thousand dollars, and has been in possession since said date.

The record shows a full and complete copy of all the proceedings in the Probate Court of Mobile County; wherein Jetta Simon was declared *non compos mentis*, and Ralph G. Richard was appointed her guardian, and as such was, on proceedings duly taken, authorized to sell such property and make such conveyance to Henry Simon, the purchaser, from whom Craft purchased the property.

The proceedings in lunacy, were commenced by a petition filed in the Probate Court of Mobile County, the court having jurisdiction, by Ralph G. Richard to have Jetta Simon declared *non compos mentis*. Record, p. 19.

The statutory order was made by the court to the sheriff to bring Mrs. Simon into court at the trial of said question as to her lunacy. Record, p. 20.

A jury was empaneled, and a trial was had, and the jury rendered a verdict as follows: "We the jury find Mrs. Jetta Simon to be of unsound mind." Record, p. 19.

The order of the court was then made on said verdict and in accordance therewith. Record, p. 23.

Afterwards Ralph G. Richard applied for letters of Guardianship and was appointed Guardian "over the estate of said Jetta Simon on the execution of a bond of $7,000." Record, p. 24.

Ralph G. Richards afterward applied to the court for an order to sell the property, a guardian *ad litem* was appointed and trial had on evidence, and the order was granted, and the property was duly and regularly sold

at public auction by said guardian, and Henry Simon became the purchaser, and paid the purchase money. Craft afterwards bought from Simon. Record, pp. 26, 35, 38, 39.

There was no attack made in the court below or in the Supreme Court of Alabama on the regularity of the petition for sale and the sale made by the guardian, and we do not suppose any attack on the same will be attempted in this court. The whole attack was made on the regularity or irregularity of the proceedings in the adjudication of Mrs. Simon to be a lunatic, and the consequent appointment of a guardian over her person and property.

This cause was first tried in the Circuit Court of Mobile County on the agreed statement of facts and a verdict was rendered for the plaintiff. It was then appealed to the Supreme Court of Alabama, and this judgment was reversed with a dissenting opinion and the cause remanded.

See Craft vs. Simon, 118 Alabama, 625.

On the second trial in the Circuit Court judgment was rendered for the defendant. The cause was then again appealed to the Supreme Court of Alabama, and was affirmed by the whole court, but no opinion at length was delivered. It was merely affirmed on the authority of Craft vs. Simon. 118 Alabama, 625.

By a writ of error, the cause was brought to this court.

This cause then has been before the State courts of Alabama four times. It will be noticed, that the whole case turns on the construction of the Statutes of Alabama as to lunatics and the requirements and practice under said statutes as to lunatics.

FIRST.

Is there any federal question in this cause which this court will take jurisdiction of and adjudicate?

Article 14 Section 1 of the Amendments to the Constitution of the United States reads as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law."

Is this clause at all applicable to this case as presented?

This court has said: "When the parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."

Central Land Co. vs. Laidly, 159 U. S., 12,

And again, "We have repeatedly held that the construction of a State statute belongs to the State courts, and is not a federal question which we can review on a writ of error to a State court."

Ins. Co. vs. The Treasurer, 11 Wall, 208.

Again: "The decision of a State court as to what should be deemed a fraudulent conveyance, does not present any federal question."

McKenna vs. Simpson, 129 U. S., 511, 512.

Again: "A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the constitution is met *if the trial is had according to the settled course of judicial proceedings.*"

"Due process of law is process due according to the

law of the land. This process in the States is regulated by the law of the State."

"Here the State court has decided that the proceeding below was in accordance with the law of the State, and we do not find that to be contrary to the constitution or any law of the United States."

Walker vs. Sauvinet, 92 U. S.. 92.

See also

Murray's Lessee, vs. Hoboken L. & Imp. Co., 18 How., 280.

Head vs. Amoskeag Co., 113 U. S., 26.

Moreley vs. Lake Shore R. R., 146 U. S., 171.

Hartford Fire and Ins. Co. vs. Chicago, Milwaukee and St. Paul R'wy Co., 175 U. S., 91.

"The court below having had jurisdiction of the offence and of the accused, and having proceeded under a statute not repugnant to the constitution of the United States, the Circuit Court of the United States had no right to interfere."

Bergieman vs. Backer, 157 U. S., 655.

See also

Dougherty vs. Nevada Bank, 160 U. S., 171.

Bacon vs. State of Texas, 163 U. S., 207.

Wood vs. Brady, 50 U. S., 18.

14 Wallace, 9, 10, 22, 661.

Marqueze vs. Bloom, 16 Wallace, 351.

"The elementary rule is, that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort."

Tullis vs. Lake Erie and Western R. R., 175 U. S., 353.

Missouri and Kansas R. W. Co. vs. McCann, 174 U. S., 580, 586.

As this cause of Simon vs. Craft embraces the construction of state statutes, and the proper proceedings thereunder, we contend that due process of law has already been administered, and that this court will not review the proceedings of the state court, and we respectfully ask that this cause may be dismissed.

SECOND.

OF DUE PROCESS OF LAW.

There is no question before this court except the one, whether plaintiff in error has been deprived of her property by due process of law; as there is no other federal question claimed to be in the case.

The attempt of the plaintiff in error doubtless will be here as it was below, to show that the proceedings which resulted in the sale of her lands by her guardian in lunacy, under which sale defendant holds, are void, as wanting in "due process of law."

We submit that such is not the case. *First*, because the lunacy proceedings inveighed against and complained of as invalid, were such as were usual and customary and whose validity was familiarly recognized in the ancient practice and long prior to the adoption of the fourteenth amendment; being and always having been, well recognized administrative proceedings to fix the status of a subject or citizen in the exercise of the parental power of the crown and state, in behalf of a class of unfortunates, and being a prerogative proceeding, *sui generis*, savoring perhaps of a proceeding *in rem*, but in no sense of proceedings *inter partes;* of a sort that belongs and has always belonged to the class of prerogative, state, pro-

ceedings known as inquisitions of office, which if duly taken by the sovereign, cannot be collaterally inquired into. *Second*, because the proceedings in lunacy were not taken without adequate notice to the lunatic, even if notice were requisite.

It has never been controverted in this case, that if the lunacy proceedings are valid, the subsequent sale by the guardian in lunacy are likewise valid.

I.

Due process of law as found in the constitution, signifies the law of the land, to use the language of Magna Carta. The constitution makes no attempt to define what proceedings constitute due process, but assumes that custom and law has already settled what it is.

Murray's Less. vs. Hoboken, 18 How., 275, 280.
Walker vs. Sauvinet, 92 U. S., 90.
Maxwell vs. Daw, 176 U. S., 581-595.
Reagh vs. Spann, 3 Stew., 1-8.

In Lowe vs. Kansas, 163 U. S., 81-85, this court said:

"Whether the mode of proceeding prescribed by this statute and followed in this case was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the declaration of independence and in this country since it became a nation in similar cases." See also:

Ex parte Wall, 107 U. S., 265.
Davidson vs. New Orleans, 96 U. S., 97.
Holman vs. Manning, 65 N. H., 228.
King vs. Mullens, 171 U. S., 404, 430, 431.
Weimer vs. Bunbury, 30 Mich., 201.

From the opinion in this Michigan case, pronounced by Mr. Justice Cooley, we quote:

"There is nothing in these words ('without due process of law') however, that necessarily implies that due process of law must be judicial process; much of the pro-

cess by means of which the government is carried on, and the order of society maintained is purely executive or administrative. * * * Estrays were at common law taken up and disposed of without judicial proceedings. * * * Proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms. * * * And any hearing allowed to parties in their progress has not been in the nature of a trial, but as a means of enlightening the revenue officers upon the facts which should govern their action. This has been so from time immemorial, and it has never been supposed that the tax payer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount. * * There is nothing technical, or we think obscure, in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the constitution what is lawful process, but we test their action by principles which were before the constitution, and the benefit of which we assume that the constitution was intended to perpetuate. If there existed before that instrument was adopted, well known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from ny general language than we should be to infer an intent to abridge the judicial authority by the use of similar words. *The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation.* They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are sufficient for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

"We are, therefore, of necessity driven to an examination of the previous condition of things. * * *Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it.* Administrative process of the customary sort is as much due process of law as judicial process."

As was said in Murray's Lessees vs. Hoboken, 18 Howard, 280, "Though due process of law generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, *yet this is not universally true.*"

II.

The proceeding of inquisition of lunacy is a special and peculiar proceeding belonging to the class of inquests of office, and it does not remotely resemble an action *inter partes.*

The care of insane persons in England was vested in the king as *parens patriae*, and was exercised by him under his prerogative by his chancellor.

Pope on Lunacy (4th Ed. London, 1900), 22, 25, 47.
13 Ency. Brit. 113, Tit. Insanity.
Shelf. Lun., Chap. IV.

It comes near to, if not founded on the police power, which is not impaired by the clause unde consideration.

Barbier vs. Connally, 112 U. S., 27-31.

The existence in the American state, of the King's prerogative powers as *parens patriae* cannot be denied.

Mormon Church case, 136 U. S., 1, 58.

As stated in Ex parte Crammer, 12 Ves. Jr., 441, "The whole prerogative is this; that it falls to the King to take care of those who cannot take care of themselves." The expression used by the learned chancellor in this case, that the lunatic must be present, "which is his privilege," is a mere direction by the chancellor under the circumstances of that case and while ordering a commission of lunacy, and cannot be taken to be a ruling that such notice is an essential prerequisite to the validity of the

inquisition; for so interpreted, it would have no support in the other and elder cases.

Shelford Lun., Chap. IV, *passim*, and particularly Sec. 4 and Marg., pp. 86, 100, 101.

These inquests of office are *sui generis* and *ex parte*, though the courts might permit or order notice in their discretion.

Pope on Lun., (4th Ed.) 47, 59, *note d.*
Shelford Lun. Marg., p. 101 and Chapter IV generally and forms.
King vs. Daily, 1 Ves. Sr., 269 cited therein.
Re Wendell, 1 Johns. Ch. 600.
Medlock vs. Cogburn, 1 Rich. Eq. 477.

Being so they cannot be impeached on collateral attack for want of notice.

Dutcher vs. Hill, 29 Mo., 291.
citing Willis vs. Willis, 12 Penn. St., 179.
Bethea vs. McLennon. 1 Ired. L., 523.
In re Cook, 6 N. Y., Supp., 720.
Nailor vs. Nailor, 4 Dana, 340.
Kimball vs. Fish, 39 N. H., 210.
Rogers vs. Walker, 6 Penn. St., 371. (opinion by Gibson, C. J.)
Hutts vs. Hutts, 62 Ind., 214.

They were in England held by the King's officers; escheator, sheriff or commissioner, under commission issued out of chancery, concerning any matter that entitled the King to lands, goods or chattels.

1 Black. Com., 305.
2 Black. Com., 258.
Shelf. Lun., marg. p. 74.
Ex parte Barnesly. 3 Atk., 171.
16 Ency. of Law, 2nd Ed., 565-6.
Pope Lun., (4th Ed.), 22, 23.

They were, therefore, *ex parte*, and notice was not essential, but discretionary. "Under the old practice it

was unnecessary to serve the lunatic in any case with notice of the execution of the commission. * * * In many cases, what Lord Hardwicke called 'the laying hold of his lands,' was the first notice received by the alleged lunatic."

Pope on Lun., (4th Ed., London, 1892) 59, *note d.*

"The law has provided that no person shall be put in such a position, deprived of his liberty and the administration of his affairs, until the fact is ascertained by a proceeding that I must admit to be *ex parte*".

Ex parte Ward, 6 Ves. 579.
Ex parte Hall, 7. Ves. 261.

This inquisition is not in any wise a suit *inter partes*, and personal notice is not essential, it being only a mode by which the public discharges its duty to a citizen.

Chavennes vs. Priestly, 80 Iowa, 316.

Hence the petitioner moving the inquisition, is not deemed a real party in interest and cannot appeal save as to costs adjudged against him.

Studebaker vs. Markley, 7 Ind., App. 368.

"Such inquests are of a public nature and taken under competent authority, to ascertain a matter of public interest, they are admissible against all the world. They are very analogous to proceedings *in rem.* being made on behalf of the public; no one is properly a stranger to them; and all who can be affected by them usually have the power of contesting them."

1 Stark. Ev. marg., p. 307.

That office found is a public transaction carrying notice to the world seems recognized in this court.

Bennett vs. Hunter, 9 Wall, 326.
King vs. Mullins, 171 U. S., 404.

"An inquest of lunacy may be considered to be in the nature of a proceeding *in rem.*"

Hart vs. Dramer, 6 Wend., 497.

Which proceedings are above collateral assault.

Grignon vs. Astor, 2 How., 319.

Such then was the ancient and customary practice on the inquisition of lunacy. Lunacy being found under commission and duly returned, the appropriate court appointed a committee, now in Alabama styled a guardian.

The legislation in Alabama has followed the ancient traditions; the first acts being those of 1803 and 1806 of the legislature of the Mississippi territory from which Alabama sprang, which statutes are found in Turner's Laws and by which the orphan's court was "authorized and empowered in their county, on request of friends or relations of any idiot, lunatic or person *non compos mentis*, to direct the sheriff to summon twelve jurors to make inquisition thereto, on oath, and if such person shall be adjudged by such inquisition to be incapable of taking care of him or herself, and when they, or a majority of them, shall so certify to the orphan's court, said court shall assign some suitable person to be guardian."

Turner's Laws, Mississippi Territory, 446, Sec. 32.

Lunatic's lands might be sold under same power and restrictions, as by executors and administrators. (Sec 33.)

This remained unchanged, (see Toulmin's and Aikin's Digest and Meek's Supplement, Ala. Statutes) until the adoption of the Acts of 1819 and 1821, found in Clay's Digest at page 302, sections 29, 30; by which the provision is: That it shall be lawful for the orphan's court when any lunatic is within its jurisdiction, to appoint a guardian for such lunatic during pleasure, "such lunacy to be ascertained by the inquisition of a jury, by virtue of a writ to be issued by the court to the sheriff of the county for that purpose," (sec. 29); and inquisitions might be ordered in vacation or in open court and made returnable as process of citation. On sufficient cause shown the judge might order that such inquisition be had before him; in other respects such inquisition should be had as theretofore. (Sec. 30.)

Next, came in the present statute, with the Code of 1852, which, with no material alteration, save from probate *judge* to probate *court*, is embodied in the Code of 1886. This, in section 2390, Code of 1886, makes it the duty of the probate court to appoint guardians for persons of unsound mind, residing in the county, etc., under the limitations and in the mode thereinafter prescribed; section 2391 of the last-named Code declares that a guardian must not be appointed for a person alleged to be of unsound mind until an inquisition has been had and taken as directed.

Section 2393 prescribes the duty of the court on receipt of the sworn petition of any relative or friend of the person, setting forth the "facts," *and* the name, age, sex and residence of such person; which is in such case, to appoint a day for the hearing thereof.

Section 2393 prescribes the method of procuring a jury, which, however, is superseded so far as Mobile county is concerned, by the local jury law; and provides for subpœnas for witnesses, and a writ to the sheriff to take the person alleged to be of unsound mind and if consistent with his health and safety, have him present at the place of trial.

Section 2394 provides for an inquisition into the facts alleged in the petition and verdict thereon.

Section 2395 provides, that if the jury find the facts alleged to be true, and that such person is of unsound mind, the court shall record the petition and proceedings and appoint a guardian.

So it will be seen that from the beginning, the thing inquired into by the jury, in a summary way, is the mental status of the person in respect of whom the proceeding is had. The court must only act when it has jurisdiction

by residence, etc., and on a verified petition filed by a relative or friend; these concurring it is its duty to appoint a guardian for every person of "unsound mind" "who shall be so found on the inquest."

The Alabama law further follows the ancient practice in that it provides for a retrial of the question of lunacy upon application, at any time, of the alleged lunatic, the proceeding being closely analagous to the traverse of the common law; upon issue joined, "the like proceedings must be had, as upon the original inquisition."

Code Ala. 1886, §§2397-2400.

Code Ala. 1896, §§2262-2265.

Compare Shelf. Lun., Of Traversing the Inquisition, marg. p. 113.

An examination of the lunacy statutes of the american states will, we believe, show that they almost universally, and, up to a recent period, universally resembled the ancient English procedure, in making no provision for the service of summons or notice on the alleged lunatic of the pendency of the inquisition. It is inconceivable that all these statutes, patterned as they are upon the old methods, are invalid, as not following "the law of the land."

It is true that while there are American cases of respectability that regard personal notice to the alleged lunatic, as prerequisite to the validity of these proceedings; yet they all, we think, arise from a failure to consider the nature and history of the procedure, or grow out of the expressions contained in the opinion of the Massachusetts court in the case of Chase vs. Hathaway, 14

Mass., 222, which are inconsistent with the nature and history of the proceeding and of the american legislation in line with these traditions.

The case of Chase vs. Hathaway arose, it should be noted, on direct appeal from the tribunal holding the inquisition, and the learned chief justice in the course of his opinion giving his reason for reversing the decree of the probate court, on this direct appeal, declared that he thought it advisable, that, when commission issued, notice should be given to the person proceeded against; and while admitting that the statutes provided for no notice, declared that a notification served and returned in the manner practiced with other processes would be sufficient. In support of his views, he cites a case before the Lord Chancellor of England, wherein the latter "*was inclined*" to but did not quash the inquisition, the commission not having been executed at the place of abode of the lunatic, and the order that he should have notice having been disobeyed. *7 Ves. Jr., 261.* A case which shows that such notice was not, in the english practice, deemed absolutely essential to the validity of the inquest and finding of lunacy.

Per contra where the attack is made collaterally, and the court has to face the question of the validity of the proceeding upon the inquest; the following cases held these to be above attack:

S. Tier Mas. etc., vs. Laudenbach, 5 N. Y., Supp. 901.
Arington vs. Short, 3 Hawk., 71.
Dutcher vs. Hill, 29 Mo., 291 and cases cited.
Chavannes vs. Priestly, 80 Iowa, 316.
Medlock vs. Cogborn, 1 Rich. Eq., 477.
Smith vs. Barnham, 1 Aik., (Vt.) 84.
Kimball vs. Fisk, 39 N. H., 210.
Rogers vs. Walker, 6 Penn. St., 371.

Boswell Jus. § 56

In England and under american authorities the proceeding could go on against a non-resident or absent lunatic.

Pope Lun., (4th Ed.) 70.
Shelford on Lun. and cases cited p.
Ex parte Southcote, 2 Ves. Sr., 401.
Matter of Child, 16 N. J. Eq., 498, and cases cited therein.
Matter of Perkins, 2 John, Chan., 124.
Re Petit, 2 Paige, 174.
Re Gause, 9 Paige, 416.

which could not be, were not the proceeding administrative and *ex parte* or *in rem* in its essence.

III.

If notwithstanding the peculiar character of this lunacy proceeding personal notice to the alleged lunatic is essential to its validity, all that need appear is, that notice actually came to the party; the form is immaterial.

L. & N. R. R. Co. vs. Schmidt, 176 U. S.
Chase vs. Hathaway, 14 Mass., 222.
Fore vs. Fore, 44 Ala., 478.

IV.

If, however, this be treated as a mere proceeding *inter partes*, and if our eyes shall be closed to the history of its origin in prerogative and of its classification among the inquisitions of office necessary in the administration of the functions and duties of the state for the protection of an unfortunate class; yet, here is presented a case, where the proceeding was not had without a substantial notice being required by the statute and the notice actually given.

Upon the filing in the Probate Court of the verified petition for an inquisition into the alleged lunacy of Jetta Simon, on January 30th, 1889, an order was duly entered, appointing the 6th day of February for hearing

the said petition and for the drawing and summoning of a jury as required by law, and a writ was ordered to issue to the sheriff requiring him to take said Jetta Simon "so that he have her in court to be present at the trial thereof, if consistent with the health and safety of her, the said Jetta Simon." This action by the court was in strict accordance with the Alabama statutes as found in the Code. The sheriff returned, that he executed the writ by taking into custody the said Jetta Simon, "and handing her a copy of the said writ," and that as it was inconsistent with her health and safety to have her present at the place of trial, and on the advice of a physician named and whose certificate is attached, "she is not brought before the Honorable Court." The physician's certificate attached is copied on page 21 of the record, the setting of the case, writ and return being found on page 20 thereof. The court itself, on the inquest, found the facts alleged in the sheriff's return regarding her unfitness to be present, to be true. (Rec. p. 23.)

The law of Alabama humanely provides, that in all these cases the alleged lunatic shall be taken and brought to the court, if consistent with her health, and the order of the court followed this, and the precept to the sheriff said the same thing, though in a slightly different way and did not in precise arrangement of its words conform to the statute, but required him to take the alleged lunatic, if consistent with her health, and have her at court. The two expressions mean exactly the same thing. It will be seen that he executed the writ as if it had been in statutory form, and that the writ designated the day of the hearing and the object of the hearing, and came to the hands of the alleged lunatic by service of copy, all on the 31st day of January, 1889, six days be-

fore the trial. This is all that the record shows was done with Mrs. Simon, who is not shown to have been restrained after the sheriff ascertained her condition or unfitness for being taken before the jury. *44 Ala., 481.*

This conveyed to the person proceeded against, the now plaintiff in error, Mrs. Simon, if she was a sane person, the most distinct and unmistakable notice and admonition that her liberty and estate was threatened, so far as the law of lunacy could interfere with these, and she had personal notice therefore, of the proceeding, as full and complete, in fact, as could have resulted from a common writ of summons. Not only is this manifestly the case on the face of the record, but it has been so adjudged by the Supreme Court of Alabama, not in this case alone, but in a case which arose many years anterior to this one; the case of *Fore vs. Fore, 44 Ala., 478*; in which the writ and return ran as in the case at bar; the court holding that this was adequate notice to the person proceeded against.

The command to the sheriff was, not that he take and detain, until discharged by law, the alleged lunatic; but was simply a command to the sheriff to take her and produce her, if in a fit condition to endure the strain; in the language of the writ, to ascertain if she was in fit condition to be brought before the jury, and if she was, to take her and fetch her there, and under this writ and under this statute, no detention save to the extent necessary to the taking her to bring her, if fit, before the jury, is contemplated or permissible. Here we have no mittimus or warrant of commitment of the unfortunate to the sheriff, to be by him detained or restrained until discharged by law, and no return by the sheriff that he has

put her person under any continued restraint, and therefore no justification for the assumption by plaintiff in error, that the record shows that instead of an opportunity having been given to the alleged lunatic to defend herself she was absolutely restrained from appearing and defending. We take it that no such thing is established by the record. What terms could have been used in the statute more clear than these which are used, to indicate that the writ to the sheriff and the execution of that writ was for the purpose of authorizing, merely, the bringing before the court of the afflicted person if fit to be so brought. How, from this statute can be spelled an indefinite commitment of the lunatic to prison? There is no alternative direction to take her and bring her to court and if she be unfit to lock her up, or hold her for further disposition. The simple command is, take her and bring her to court unless this is impracticable from humane considerations, in which case you need not do so. It certainly followed, that if she was on investigation found unfit to be brought he could only release her, the object of his taking her having failed.

See the contention on this return, of Mr. Cumming, in Fore vs. Fore, 44 Ala., 481.

However, assuming to be well founded in the record, plaintiff in error's contention that the respondent was restrained of her liberty and forcibly prevented from appearing in person, a thing not shown, but assumed, this would, we take it, not destroy the validity of the proceedings on this collateral attack. From nothing does it appear that the defendant was prevented from being represented by counsel thereat, from summoning witnesses and from having herself relieved from the restraint, if, as she now contends, it was improper and illegal, by *habeas*

corpus. If every arrest restraining the liberty of one proceeded against in the courts is such a deprivation of the defendant's liberty and free action as forbids his defense there, then has come an end to all proceedings against those charged with crimes not bailable, or if bailable, to answer which they have not entered into bail. So, had Mrs. Simon remained under the care of the sheriff, she was nevertheless entitled to employ counsel and be heard in court and, if needful, to be brought into court for the purpose of being there heard, by appropriate process and to an appeal or *certiorari;* and if the Alabama law was invalid, in so far as it reposed in the discretion of the sheriff the decision whether she should be brought into court or not, then the courts, including the probate court, were open to her, to remove the illegal restraint by writ of *habeas corpus*, and she had an easy remedy for constraining this officer to conduct her into the court, or to release her altogether, so that she could attend.

It is plain he might rightfully be charged with taking her to produce, if practicable, at the inquest. The validty of this, we take it, could not be questioned. It is in line with the old practice. It is plain that she was in receipt of personal process notifying her of the legal proceeding which had been initiated, looking to an inquisition into her sanity. It is plain then, if anything was irregular or invalid or to be complained of, that it was the detention of her by the sheriff, if such detention continued, or the law which authorized such detention, and it cannot be said that by such an illegal detention, if illegal it was, she was deprived of notice of the proceeding or sufficient opportunity to defend. Unless there was entire absence of notice, we take it the jurisdiction of the court cannot be even plausibly contended against.

This court has as already adverted to, taken the same view as the Alabama court, that the mere form of the procedure is not regarded; that it is enough if the interested person had actual notice.

L. & N. R. R. vs. Schmidt, 177 U. S., 236.

The Alabama practice in this matter of waiving production of the lunatic if it appear to be improper to have her produced, is not dissimilar to that of other states, inspired by the same motives of humanity, in which states it was not deemed to invalidate the proceedings.

As the presence of the alleged lunatic has always been deemed desirable, statutes usually require the presence of such person when practicable and have been upheld in the courts. Besides Alabama, for example see

Indiana R. S. 1881, § 2547.
Martin vs. Matsinger, 130 Ind., § 555.
Kentucky, McAfee vs. Commonwealth, 3 B., Mon. Ky., 305.
New York, Re Blewitt, 131 N. Y., 541; Re Wendell, 1 Johns., 600; Re Tracy, 1 Paige, 580.
South, &c., vs. Laudenback, 5 N. Y. Supp. 901.
Missouri, Dutcher vs. Hill, 29 Mo., 271.
New Jersey, *Re* Vanauken, 10 N. J., Eq. 186.
Ontario, Re Newman, 2 Chamb., 390.

V.

If it be contended that, though erroneously, the Alabama Courts have held personal notice to be essential to the validity of these inquisitions, we answer that we abide the Alabama doctrine, which is, that notice by the sheriff taking the alleged lunatic under the writ is sufficient, and none other is needed.

Fore vs. Fore, 44 Ala., 478.
Craft vs. Simon, 118 Ala., 625.
Simon vs. Craft, MS.

And if this court departs from the Alabama court's influence and would determine the case on principle; then it is not bound to assent to any part of the Alabama doctrine as to whether personal, as distinguished from the general and universal notice which is presumed to attend these governmental inquisitions, is essential to the validity of the finding.

By way of special reply to certain matters in the brief filed on behalf of plaintiff in error, and which came to our hands after the above was put in type, we submit the following:

First, we would call attention to an extremely grave error on pp. 42, 43, of the brief, which sets out as the statute law of Alabama governing the case, section 2750 of the Code of *1852*, and omits the equivalent section of the later and controlling Code of *1886*, and upon the language of the section in the former Code, bases the argument, that the probate judge, and not the probate *court*, was designated to call the jury and with it form the statutory tribunal created to inquire into the sanity of the citizen; the brief saying, that this clause of the Code of 1852 remained in this respect unchanged by any act of the legislature up to the time Mrs. Simon's sanity was under inquisition. Now the fact is, that the section quoted from the earlier Code had been *ex industria* changed by the law maker in this very particular, and this duty which had theretofore rested upon the probate judge, was imposed upon the probate court. We reproduce the equivalent section 2392 as found in the Code of 1886.

§2392. *Inquisition; proceedings*—Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the *court* of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof." (Italics ours.)

However, it is submitted, that upon construction of the domestic statutes as to the organization of the court, the summoning of the jury and the like, the decision of the domestic forum will not be inquired into by this court. (See authorities on page 5 of this brief.)

The origin of the proceeding *de lunatico inquirendo*, is at this day uncertain. It is of so great antiquity that as is stated by Mr. Pope, the question is one "more suitable to a book of antiquities than to a treatise on practical law." The foundation of the authority of the chancellor to issue the commission for the inquisition, may or may not have been the statute 17 Edw. II c c., 9, 10, but this statute is usually considered to have been merely declaratory of the common law.

As to the history of the prerogative we quote from Mr. Pope's Treatise on Lunacy as follows:

"Though the jurisdiction in lunacy as at present exercised, is almost entirely the creature of statute, it is in its origin due to the delegation by the crown of the interest which it takes by virtue of its prerogative in the estates of lunatics duly found to be so, and of the trusts to which that interest is subject. This prerogative, whatever its date—and though Staundforde places it in Edward I's reign, it was probably earlier—was definitely stated in the Statute of Prerogatives of 17 Edw. 2, the ninth chapter of which relates to idiots, the 10th to lunatics. * * *

In the beginning, the management of the lands of idiots and lunatics under the protection of the crown, was with the Exchequer. As the relation of the crown became that of a trustee, it passed into the hands of the lord chancellor." P. 25.

Mr. Justice Stone, in the cited case of Whetstone vs. Whetstone, 75 Ala., 498, was dealing with the question whether certain volunteers who had sued as next friends of a weak minded person were authorized to institute such suit, and whether they could sue in equity, the person in whose behalf they sued never having been found to be *non compos* by inquisition. Therefore, he had not under consideration, whether the prerogative in the state as successor to the King, to make inquisition into the citizen's sanity still existed, as it did prior to and under the statute 17 Edw. II c. 10, but dealt merely with the question whether that statute, treated as common law, gave to the American chancery *court* merely as successor to the court of the same name in England, the same powers as were held by the *chancellor* in England in regard to lunatics; and he in effect declared, that because the chancellor here had no political powers like those of the keeper of the great seal there, therefore as chancellor merely, he did not bring into his court a general superintendence of lunatics; the court saying on page 499 "the English statute 17 Edw. II does not of itself constitute idiots and lunatics wards of the chancery court, as infants are. * * * * Such process is issued to the keeper of the great seal and not to the *court* of chancery. * * * * It is a personal confidence reposed in the lord chancellor, the keeper of the great seal, and not in the court of chancery."

As to the point first made by the dissenting opinion of Mr. Justice Head on the first appeal to the Alabama Supreme Court, and which was adopted by counsel for plaintiff in error, that the petition in lunacy neglected to state jurisdictional facts; assuming that this court will review the ruling of the state court on this question of interpretation of the domestic law, which it doubtless will not (*supra p. 5*), we respectfully refer to brief filed by us on the last appeal to the Alabama Supreme Court, copies of which are appended to this brief, and which contains a full answer to the contention. We shall attempt to obtain and append, also, copies of brief filed on the first appeal.

Respectfully submitted by

H. PILLANS,

D. P. BESTOR,

For the Defendant in Error.

H. Pillans

Supreme Court of the United States.

No. 191.—October Term, 1900.

Jetta Simon, Plaintiff in Error, *vs.* John N. Craft. } In error to the Supreme Court of the State of Alabama.

[May 27, 1901.]

This is a writ of error to review a judgment of the Supreme Court of Alabama affirming a judgment in favor of John N. Craft, the defendant in error herein. The judgment thus affirmed was entered by a lower State tribunal upon a verdict rendered on the second trial of an action in ejectment, wherein Jetta Simon, plaintiff in error herein, was plaintiff.

In brief, the facts are as follows: In 1889, Jetta Simon, a widow, resided in Mobile, Alabama, with several minor children. She lived at that time in a house of which she was the owner, being the real estate affected by the action of ejectment heretofore referred to. On January 30, 1889, Ralph G. Richard filed in the probate court of Mobile County, Alabama, a petition for an inquisition of lunacy as to Mrs. Simon. In this petition it was represented that Richard was a friend of Mrs. Simon and of her family; that she was of the age of forty-nine years, a resident of Mobile, of unsound mind and incapable of governing herself or of conducting and managing her affairs. Upon this petition an order was entered for a hearing on February 6, 1889, and that a jury "be drawn, as the law directs, for the trial of this issue." The order also provided that a writ issue to the sheriff, "requiring him to take the said Jetta Simon, so that he have her in this court to be presented at said trial, if consistent with the health and safety of said Simon." The writ issued. Therein was stated the substance of the allegations of the petition, and that the order had been entered appointing February 6, 1889, "for hearing said petition and for the due trial thereof." The command of the writ was that—

"If it be consistent with the health and safety of said Jetta Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be empanelled to make said inquisition.

"And have you then and there this writ with your return thereon as to how you have executed the same."

The writ was duly returned with the following endorsement:

"Received January 31st, 1889, and on the same day I executed the within writ of arrest by taking into my custody the within-named Jetta

Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety of the within-named Jetta Simon to have her present at the place of trial, and on the advice of Dr. H. P. Hirshfield, a physician, whose certificate is hereto attached, she is not brought before the honorable court.

W. H. HOLCOMBE, *Sheriff.*

"Mobile, February 5th, 1889. By WM. H. SHEFFIELD, *D. S.*"

The certificate referred to reads as follows:

"MOBILE, ALA., *Jan. 30th*, 1889.

"To the Sheriff of Mobile County, Ala.:

"I, H. P. Hirshfield, a regular physician, practicing in Mobile County, Ala., hereby certify that I am acquainted with Mrs. Jetta Simon, and have examined her condition on yesterday and find that she is a person of unsound mind, and it would not be consistent with her health or safety to have her present in court in any matter now pending.

H. P. HIRSHFIELD, M. D."

One Vaughan was appointed by the probate court the guardian *ad litem* of Mrs. Simon "in the matter of the petition to inquire into her lunacy." The appointment was accepted, and the guardian filed in said proceeding an answer averring "that he wholly denies all the matters and things stated and contained in said petition, and requires strict proof to be made thereof according to law." Thereupon a hearing was had before a jury, who returned a verdict that Mrs. Simon was "of unsound mind." The probate court then entered the following order or decree:

"JETTA SIMON, Lunatic.

STATE OF ALABAMA, *Mobile County.* } Probate Court of said County,

FEBRUARY 6TH, 1889.

"This being the day appointed, by reference to an entry thereof made upon the minutes of the court on the 30th of January, 1889, for the hearing of the petition of Ralph G. Richard, filed, alleging the lunacy of the said Jetta Simon and praying an inquisition thereof, and it being shown that it would not be consistent with the health and safety of said lunatic to bring her into court at this time, and it appearing that due process had been served upon said lunatic notifying her of this proceeding, now comes the said Richard and a jury of good and lawful men, who reside in the county of Mobile, and who, having been summoned, to wit, John Pollock, Jr., and eleven others, who, having heard the evidence, the arguments of counsel, and the charge of the court in the premises, and being first duly tried, empanelled and sworn well and truly to make inquisition of the facts alleged in said petition and a true verdict to render according to the evidence, upon their oath say, 'We, the jury, find Mrs. Jetta Simon to be of unsound mind.'

"It is ordered, adjudged and decreed by the court that said petition and all other proceedings thereon, together with the aforesaid verdict of said jury declaring the said Jetta Simon a lunatic, be recorded."

Subsequently, on February 11, 1889, Richard was duly appointed guardian of the estate of Mrs. Simon, and regular proceedings were had by which, under authority of the court, a sale of the real estate in question was ordered to be made for the payment of the debts of Mrs. Simon and for the support and maintenance of her family. Such sale was had in May, 1889, when Henry J. Simon became the purchaser, who sold the property to John N. Craft, defendant in error herein. In September, 1895, more than six years after the sale to Simon, the action in ejectment heretofore referred to was instituted against one Brown, a tenant of Craft. Craft, as landlord, was subsequently substituted in the stead of Brown. Upon a second trial of the issues joined, the defendant Craft, among other evidence, introduced the record of the proceedings in the probate court upon the inquisition of lunacy, to which reference has already been made, and the record of the subsequent proceedings resulting in the sale to Henry J. Simon. Objection to the introduction of such records was made upon specified grounds, all which are stated in the margin.* The objections were overruled and the record allowed to be read in evidence, to which action of the court exception was duly taken. The

* 1st. In that there was no process issued notifying Jetty Simon to be present at the trial of the inquest of lunacy that was held.

2d. In that no provision was made in or by said proceedings whereby said Jetty Simon might be present at the inquest of lunacy that was held.

3d. In that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not.

4th. In that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy.

5th. In that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprive her of the opportunity to be heard at the inquest of lunacy.

6th. In that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy.

7th. Because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with article V of the amendments to the Constitution of the United States, which provides, "Nor be deprived of life, liberty, or property without due process of law," and in conflict with article XIV of the amendments to said Constitution:

1*a*. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

2*a*. In that it authorizes a citizen to be deprived of his or her property without due process of law.

8th. Because said proceedings in the probate court are irrelevant and immaterial to any issue in the cause.

approval by the Supreme Court of Alabama of this ruling is what is here complained of.

The opinion of the Supreme Court of Alabama reversing the judgment entered on a verdict in favor of Mrs. Simon rendered at the first trial of the action of ejectment is contained in 118 Alabama, 625. The judgment entered in favor of Craft upon the second trial was affirmed upon the authority of the previous opinion.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

By subdivision 6 of section 787 of the Civil Code of Alabama of 1886 courts of probate in that State are vested with original jurisdiction over the appointment and removal of guardians for minors and persons of unsound mind. Pertinent provisions of the statutes of Alabama relating to the mode of appointment of guardians of persons of unsound mind, contained in said Civil Code, are excerpted in the margin.*

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*Sundry sections of Part 2, Title 5, Chapter 4, of the Civil Code of Alabama of 1886, pp. 535, *et seq.*:

"2390 (2753, 2754). Appointment.—The court of probate has authority, and it is a duty to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the State, having within the county property requiring the care of a guardian, under the limitations, and in the mode hereinafter prescribed.

"2391. Guardian not appointed until after inquisition.—A guardian for a person alleged to be of unsound mind, residing in the county, must not be appointed until an inquisition has been had and taken as hereinafter directed.

"2392. (2757). Inquisition; proceedings.—Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the court of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof.

"2393 (2758). Jury summoned; writ of arrest.—The judge of probate must issue a writ directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof, and also issue subpœnas for witnesses, as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.

"2394 (2759). Oaths of jurors; vacancies filled.—At the time set for the trial, if good cause be not shown for continuance, the jury must be impaneled and sworn well and truly to make inquisition of the facts alleged in the petition, and a true verdict render according to the evidence. If any of the jurors are excused from

In the proceedings to inquire into the sanity of Mrs. Simon the writ which issued to the sheriff was evidently based upon the following clause of section 2393 of the Civil Code of 1886:

"2393. The judge of probate . . . must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial."

The invalidity of the proceedings in the inquisition of lunacy which formed the basis of the subsequent proceedings for the sale of the property of Mrs. Simon is in substance predicated on the contention that the writ directed to the sheriff authorized that official to determine whether it was consistent with the health and safety of Mrs. Simon to be present at the trial of the question of her sanity; that the sheriff decided this this question against her, and she was detained in custody and not allowed to be present at the hearing on the inquisition. This latter claim, however, is founded upon the return endorsed by the sheriff on the writ directed to him. At the trial below there was no offer to prove, by any form of evidence, that Mrs. Simon was in fact of sound mind when the proceedings in lunacy were instituted, or that she desired to attend, and was prevented from attending, the hearing, or was refused opportunity to consult with and employ counsel to represent her. The entire case is thus solely based on the inferences which are deduced, as stated, from the

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serving, fail to attend, or are set aside for any cause, their places may be supplied from the bystanders.

"2395 (2760). On verdict of insanity, papers filed, and guardian appointed.—If the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition and all the proceedings thereon to be recorded, and appoint a suitable guardian of such person.

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"2396 (2761). Proceedings when person of unsound mind is confined in asylum.—If the person alleged to have been of unsonnd mind is a resident of the county, and is at the time of the application confined in an hospital or asylum within or without the State, the inquisition may be had or taken without notice to him, but on the filing of the application the court must appoint a guardian ad litem to represent and defend for him; it is the duty of such guardian by answer to put in issue the facts stated in the application, and to employ counsel at the expense of such person of unsound mind to appear and defend.

"2397 (2804). Application for revocation of guardianship.—At any time after the inquisition the person ascertained to be of unsound mind, by himself or by next friend, may apply in writing to the court of probate for a revocation of the proceedings against him, and of the letters of guardianship; the application to be accompanied by the certificate in writing of two physicians or of two other competent persons, stating that after examination of such person they believe him to be of sound mind.

"2398 (2804). Proceedings on application.—On the filing of such application the court must appoint a day for the hearing thereof, not more than ten days there-

face of the return of the sheriff. And upon the assumptions thus made it is contended that the statute as well as the proceedings thereunder were violative of the clause of the Fourteenth Amendment to the Constitution of the United States, which forbids depriving any one of life, liberty or property without due process of law.

It is not seriously questioned that the Alabama statute provided that notice should be given to one proceeded against as being of unsound mind of the contemplated trial of the question of his or her sanity. Indeed, it would seem that it was not urged before the Supreme Court of Alabama that the statutes of that State failed to provide for notice, and that court assumed in its opinion that no question of that character was presented. As a matter of fact, a copy of the writ which issued and which embodied a notice of the date of the hearing of the proceedings in lunacy is shown by the record to have been actually served on Mrs. Simon. As early as 1870 the Supreme Court of Alabama in *Fore* v. *Fore*, (44 Ala. 478, 483,) held that the service of the writ upon a supposed lunatic was the notice required by the statute and brought the defendant into court, and that if he failed to avail of such matters of defense as he might have, he must suffer the effect of his failure to do so.

We excerpt in the margin the portion of the opinion of the Supreme

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after, and the guardian and the person at whose instance the inquisition was had and taken must be cited to appear and show cause against it.

"2399 (2805, 2806). Contest of application.—If the guardian or person at whose instance the inquisition was had and taken appear and deny the allegations of the application, the court must appoint a day for the trial of such contest, not more than ten days thereafter, and must cause a jury to be summoned for the trial thereof, and the like proceedings must be had as upon the original inquisition; or if there be no contest of the allegations of the application, and the court is satisfied of the truth thereof, a decree must be entered revoking the proceedings on the inquisition and the guardianship, and declaring that the ward must be restored to the custody and management of his estate.

"2400 (2807). Judgment on contest; costs thereof.—If on the trial of the contest, the jury find the facts stated in the application to be true, the court must enter a decree revoking the proceedings on the inquisition and the guadianship, and declaring that the ward must be restored to the custody and management of his estate, and must adjudge the costs as is just and equitable, but if the verdict of the jury negatives the facts stated in the application, a judgment of dismissal at the costs of the applicant or of the next friend must be entered.

"2401 (2803). Revocation on application of guardian.—If, at any time after his appointment, the guardian becomes satisfied that the ward has been restored to sanity, and is capable of managing his estate, and the judge of probate is of opinion, from the proof and the facts stated, that such representation is correct, he must make an order that the guardian be discharged, and that the estate of the ward be restored to him.

Court of Alabama which dealt with the objection that Mrs. Simon was deprived of opportunity to be heard.*

The contention now urged is that notice imports an opportunity to defend, and that the return of the sheriff conclusively established that Mrs. Simon was taken into custody and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred the State court interpreted the statute—that the purpose in the command of the writ, "to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial," was to enforce the attendance of the alleged *non compos*, rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in a fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting. The essential elements of due process of law are notice and

* "The second ground of objection is that the appellee had no opportunity to be heard at the inquisition. This objection is based upon the character and wording of the writ directed to the sheriff. The provision of the statute is that the judge must 'issue a writ, directed to the sheriff, to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.' The writ that issued, after setting out the facts averred in the petition, proceeded: 'Now, therefore, if it be consistent with the health and safety of said Jetta Simon, you are hereby required to take her body so that you may have her in said court, &c.' The statute is that the sheriff be directed to take her body, and, if consistent with health, &c. By the statute it is made the duty of the sheriff to take the body without condition, and, if consistent with health and safety, to —— her present at the trial. The writ issued, directed to the sheriff, 'if consistent with health and safety, to take her body, &c.' The return of the sheriff shows that the writ was executed in accordance with the statute. It is: 'I executed the within writ of arrest by taking into my custody the within-named Jetta Simon and handing a copy of said writ, and as it is inconsistent with the health or safety . . . to have her at the place of trial . . . she is not brought before the court.' Technically the writ of the judge was not accurately correct. Its meaning, however, is evident. The sheriff's return was complete and regular in every respect. We do not doubt she was brought into the court in the manner prescribed by statute, and that she was subject to its jurisdiction. The second objection cannot be sustained." (118 Alabama, 636.)

opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form. (*Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230.) We cannot, then, even on the assumption that Mrs. Simon was of sound mind and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable. The view we take of the statute was evidently the one adopted by the judge of the probate court, where the proceedings in lunacy were heard, since that court, upon the return of the sheriff, and the failure of the alleged lunatic to appear, either in person or by counsel, in order to protect her interests, entered an order appointing a guardian *ad litem* "in the matter of the petition to inquire into her lunacy;" and an answer was filed by such guardian denying all the matters and things stated and contained in the petition, and requiring strict proof to be made thereof according to law.

It is also urged as establishing the nullity of the appointment of a guardian of the estate of Mrs. Simon that the proceedings failed to constitute due process of law, because 1, they were special and statutory, and the petition failed to state sufficient jurisdictional facts; 2, a jury was not empanelled as provided by law; and, 3, there was no finding in the verdict of the jury or the order entered thereon ascertaining and determining all the facts claimed to be essential to confer jurisdiction to appoint a guardian. But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it. (*Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236, and cases cited.) If the essential requisites of full notice and an opportunity to defend were present, this court will accept the interpretation given by the State court as to the regularity under the State statute of the practice pursued in the particular case. Tested by these principles, we accept as conclusive the ruling of the Supreme Court of Alabama that the jury which passed on the issues in the lunacy proceeding was a lawful jury, that the petition was in compliance with the statute, and that the asserted omissions in the recitals in the verdict and order thereon were at best but mere irregularities which did not render void the order of the State court, appointing a guardian of Mrs. Simon's estate.

Judgment affirmed.